Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

SBC COMMUNICATIONS INC., SBC INTERNATIONAL, INC., SBC INTERNATIONAL LATIN AMERICA, INC.,
Petitioners,

v.

ACCESS TELECOM, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court must engage in an analysis of international comity concerns before applying the Sherman Act to extraterritorial matters.

PARTIES TO THE PROCEEDING

SBC Communications Inc.
SBC International, Inc.
SBC International Latin America, Inc.
MCI Telecommunications Corp.
MCI International, Inc.
Telefonos de Mexico, S.A. de C.V. (Telmex)
Access Telecom, Inc.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners advise the Court as follows:

SBC Communications Inc. (formerly Southwestern Bell Corporation) is a publicly held corporation with equity and debt in the hands of the general public. The principal directly and indirectly held subsidiaries of SBC Communications Inc. include Ameritech Corporation ("Ameritech"); Ameritech Mobile Communications; Ameritech Publishing; Pacific Telesis Group; Pacific Bell; Nevada Bell; Southwestern Bell Telephone Company; SBC Wireless, Inc.; Southwestern Bell Yellow Pages, Inc.; Pacific Bell Directory; SBC International, Inc.; SBC International Latin America; Southern New England Telecommunications Corporation ("SNET"); and Southern New England Telephone Company ("SNET Telco"). Southwestern Bell Mobile Systems, Inc., is a subsidiary of SBC Wireless, Inc. Pacific Bell Mobile Services is a subsidiary of Pacific Telesis Group. The subsidiaries of SBC Communications Inc. are principally engaged in the business of providing communications services and products to the general public.

SBC Communications Inc., Southwestern Bell Telephone Company, and SBC Communications Capital Corporation each have publicly held debt. The following Ameritech subsidiaries have issued debt securities to the public: American Capital Funding Corporation, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. Pacific Bell, Nevada Bell, SNET, and SNET Telco have issued debt securities to the public. In addition, certain indirectly held subsidiaries of SBC Wireless, Inc., have small groups of minority shareholders. A trust established and funded by Pacific Telesis Group has issued "Trust Originated Preferred Securities" to the public. Pacific Telesis Group has guaranteed the repayment of certain trust originated preferred securities that have been issued to the public, the repayment of which has been

guaranteed by SBC and Pacific Telesis Group. Ameritech owns approximately 42% of TeleDanmark, A/S, the stock of which is publicly traded. TeleDanmark owns approximately 19% of Netcom ASA, which is publicly traded.

Ameritech also owns approximately 50% of an entity that owns approximately 60% of Magyar Tavkozlesi Rt. ("MATAV"), a telecommunications company in Hungary, the stock of which is traded publicly. Ameritech owns all of the common stock of Ameritech Canada, Inc., which is the sole trustee of the Ameritech Canada Business Trust, which owns approximately 20% of Bell Canada Holdings, Inc., which owns Bell Canada, which has publicly traded debt. Also, Bell Canada owns approximately 21% of Teleglobe Inc., approximately 41% of Alliant, and approximately 20% of Manitoba Telephone, each of which has issued shares to the public.

No other affiliates of SBC Communications Inc. have outstanding debt or equity securities that are publicly held.

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PETITION FOR A WRIT OF CERTIORARI

SBC Communications Inc., SBC International, Inc., and SBC International Latin America, Inc. (collectively, the "SBC entities") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 197 F.3d 694. The opinion of the district court granting summary judgment to the defendant SBC entities (*id.* at 43a-59a) is unreported. The district court decisions granting summary judgment to defendants MCI Telecommunications Corporation and MCI International, Inc.

Telecommunications Corporation and MCI International, Inc. (collectively, "MCI") (*id.* at 60a-90a) and dismissing the claims against defendant Telefonos de Mexico, S.A. de C.V. ("Telmex"), for lack of personal jurisdiction (*id.* at 165a-199a) are also unreported. The district court decision denying partial summary judgment to plaintiff Access Telecom, Inc. ("ATI") (*id.* at 91a-164a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1999. The court of appeals denied petitions for rehearing and rehearing en banc on February 15, 2000. *See* Pet. App. 40a-41a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant statutes are reproduced in the attached appendix to this petition. *See* Pet. App. 200a-202a.

STATEMENT OF THE CASE

This case raises a significant issue involving the limitations that international comity principles impose on the extra-territorial application of the Sherman Act. The courts of appeals are divided on this issue, and four Justices of this Court have urged a result in clear conflict with the one adopted by the Fifth Circuit here.

The international comity concerns in this case are patent. The plaintiff's antitrust claim relates exclusively to a telecommunications service available *only* to Mexican consumers making international telephone calls out of Mexico. By definition, that service is not available to consumers in the United States, and, accordingly, there can be no tenable claim that United States consumers were harmed by the conduct at issue here. Moreover, the service at issue was designed specifically to evade a key component of

Mexican telecommunications policy—in particular, the policy of granting a temporary exclusive concession to a single company as part of a gradual, carefully managed transition to telecommunications competition. For all these reasons, the issues presented here are closely intertwined with Mexican telecommunications law and policy, and have at most a tangential effect in the United States. Indeed, if the law in this country is that United States courts will intervene and impose United States policy in matters that are so intimately connected with another sovereign country's interests, there is little reason to expect that the courts of other countries will honor United States interests and policies when the situation is reversed.

Despite all those facts, the Fifth Circuit concluded that there was no need to engage in international comity analysis to determine whether Congress would have intended to permit a Sherman Act claim in such circumstances. The Fifth Circuit determined that, so long as there is some not insubstantial effect on United States commerce and so long as ATI's particular scheme to evade Mexican policy has not been squarely determined to be *illegal* by Mexican authorities, a Sherman Act suit may proceed without any inquiry into international comity concerns. As the Fifth Circuit explained: "[W]e find ATI's activity in Mexico to be legal during the time in question. Thus it was improper to dismiss ATI's state and federal antitrust claims." Pet. App. 30a.

The Fifth Circuit's mode of analysis on this recurring question of antitrust law conflicts with the approach taken by several other courts of appeals, most prominently the Ninth Circuit. In that court, unlike the Fifth Circuit, a claim of extraterritorial violation of the Sherman Act may proceed only after the court engages in a careful weighing of a variety of international comity factors, including the degree of conflict with foreign law *or* policy and the relative

significance of the effects on the United States as compared with those elsewhere. *See Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 845-47 (9th Cir.), *cert. denied*, 519 U.S. 868 (1996) ; *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 608-15 (9th Cir. 1976) ("*Timberlane I*"), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984) ("*Timberlane II*"), *cert. denied*, 472 U.S. 1032 (1985).

The Fifth Circuit's decision also conflicts with the approach advocated by four Justices in *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 812-22 (1993) (Scalia, J., joined by O'Connor, Kennedy, & Thomas, JJ., dissenting). There, Justice Scalia advocated the use of a comity analysis much like that employed by the Ninth Circuit. He explained that "the respect [that] sovereign nations afford each other by limiting the reach of their laws" requires a federal court to weigh a variety of international comity factors —among other things, "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, . . . the degree to which the desirability of such regulation is generally accepted," and "the extent to which the activity takes place within the territory [of the regulating state]"— before determining that the Sherman Act applies to extraterritorial conduct. *Id.* at 817, 818-19 (internal quotation marks omitted). The *Hartford Fire* majority, moreover, did not hold to the contrary, but rather expressly declined to reach the question of the appropriate mode of international comity analysis under the Sherman Act. *See id.* at 798 (holding that the Court "need not decide" the comity question).

The Court should grant certiorari to decide the important issue left unanswered by *Hartford Fire* and to resolve the conflict among the lower courts.

A. Telecommunications Policy in Mexico.

Mexican telecommunications policy is in transition. As in the United States, where the Telecommunications Act of 1996, Pub. L. No. 104-104, is intended to inject competition into local and long distance markets, the Mexican government is moving from an exclusive concession system—that is, a system where a single company is authorized to provide service originating in a particular area—to a more competitive structure. Again, as in the United States, such a transition requires a careful balancing of competing policies. The Mexican Secretary of Communications and Transportation and the Mexican Federal Telecommunications Commission thus jointly explained to the court below that proper management of this transition requires legislators and regulators to "encourage competition" while at the same time seeking to "foster[] universal service"—that is, the availability of widespread, affordable telecommunications service—and ensuring increased investment in the building of new and more modern "infrastructure."[1] The latter concerns are particularly acute in a country such as Mexico, where a relatively small percentage of the citizens have telephone service. *See* International Telecommunication Union, *World Telecommunication Development Report* at A-22 (1999) (in 1998, 33.9 percent of Mexican households had a telephone).

For present purposes, the key step in this transition occurred in 1990. At that time, the Government of Mexico privatized Telmex and issued it an Amended Concession that included the exclusive right to provide domestic and international long distance service in Mexico. *See* Order, Authorization, and Certificate, *Telmex/Sprint*

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[1] Brief of *Amici Curiae* the Secretary of Communications and Transportation of Mexico and the Federal Telecommunications Commission of Mexico in Support of Petitions for Rehearing and Suggestions for Rehearing *En Banc* at 5-6 ("Mexican Telecommunications Authorities *Amici* Brief").

Communications, L.L.C.; Application for Authority under Section 214 of the Communications Act, 12 FCC Rcd 17551, 17557, ¶ 14 (1997) ("*Telmex/Sprint Order*"). The 1990 Amended Concession required the private consortium that now owns Telmex (a group that includes SBC International) to make substantial service commitments, including 12 percent annual line growth and a promise to provide telephone service to all towns of more than 500 people by 1994. *See* R. Freiden, *International Telecommunications Handbook* 306 (1996).

In exchange for those very significant dollar investments, Telmex was guaranteed an exclusive concession to provide long distance and international telecommunications originating in Mexico until 1996, at which point competition would begin to be introduced to the Mexican telecommunications market. *See Telmex/Sprint Order*, 12 FCC Rcd at 17557, ¶ 14. Mexican law contains a number of provisions to ensure that this exclusive concession would not be violated—and thus that Telmex would obtain the benefit of its bargain and retain the incentive to invest in and expand its network before being exposed to competition. As the relevant Mexican authorities have explained in this case, under Mexican law, it is illegal for any entity to "'construct, establish, or exploit'" communications services without a permit or concession. *See* Mexican Telecommunications Authorities *Amici* Brief at 4 (quoting Law of General Means arts. 8 cl. 2, 12, 523, 527).

B. This Dispute.

1. This case arises out of an attempt to circumvent the exclusive concession that Mexico granted to the newly privatized Telmex in exchange for its enormous commitment of resources to expand access to, and to improve, telecommunications in Mexico.

As noted above, during the period at issue here (that is, before 1996), Telmex was the sole company authorized to carry both domestic and international long distance telephone calls originating in Mexico. *See id.* For international calls to the United States, Telmex interconnected its network at the border with United States carriers such as AT&T and MCI. Telmex also entered into international 800 number (or "I800") agreements with those United States carriers. Under those agreements, a user in Mexico could call a business in the United States, and the business (the called party) would then pay the United States carrier such as MCI. MCI, in turn, would pay Telmex at a negotiated international settlement rate.

The plaintiff ATI has no permit to provide telecommunications service of any kind in Mexico. *See* Pet. App. 26a. Nevertheless, ATI sought to exploit these I800 agreements between Telmex and United States carriers as a way of circumventing Telmex's exclusive concession and allowing consumers to make calls *from Mexico* to any number in the United States or another country. The first part of ATI's scheme was to obtain an I800 number from MCI. *See id.* at 45a. ATI then marketed that I800 number to Mexican consumers as a means of placing calls to the United States. *See id.* at 161a. An ATI customer would dial the I800 number that ATI had obtained from MCI, and ATI in turn would transmit the call to a point in the United States. *See id.* at 1a. The customer would then receive a second dial-tone, and could call any number in the United States or the world. *See id.* ATI charged its Mexican customers rates that were lower than the international tariffed rates that Telmex charged for similar calls from Mexico. *See id.* at 2a.

That service is not only contrary to Mexican telecommunications policy—because it undermines the exclusive concession that the Mexican government granted to Telmex in exchange for that newly privatized company's

investment in new infrastructure—but also, in SBC's view and in the view of the Mexican authorities, illegal under Mexican law. *See* Mexican Telecommunications Authorities *Amici* Brief at 4. As discussed above, during all times relevant here, it was impermissible under Mexican law to "construct, establish, or exploit" communications services without a permit or concession. *See id.*[2] Moreover, in 1993, Jose Maria Rivas Moncayo, an official of the Mexican Secretary of Communications and Transportation sent a letter to MCI, explaining (as translated into English) that it was "illegal in Mexico" to create services by which customers may "make long distance telephone calls to the United States . . . by way of using an 800 number, or a 3 'RINGS' call, and receiving a callback from the United States whereby a dial tone is provided in order that the user, eluding TELMEX, can dial another part of the world." SBC C.A. Record Excerpts, Tab 2.[3] Accordingly, in resolving a dispute that is indis

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[2] The Fifth Circuit cited parts of Mexico's Telecommunications Regulations that require a concession only if an entity "owned, installed, operated, *and* exploited" the Mexican telecommunications network. *See* Pet. App. 26a (emphasis added). However, as the Secretary of Communications and Transportation of Mexico and the Federal Telecommunications Commission of Mexico explained in the court below, the Fifth Circuit "relied on the wrong Mexican authority. The Law of General Means, which has supremacy over the Telecommunications Regulations adopted under it, *see* Mex. Const. art. 133, unambiguously requires a concession to 'construct, establish, *or* exploit' communications services. *See, e.g.*, Law of General Means, arts. 8 cl. 2, 12, 523, 527." Mexican Telecommunications Authorities *Amici* Brief at 4.

[3] The Federal Communications Commission understands the service that ATI provides to be a kind of "callback" service. *See* Order, Authorization and Certificate, *Via USA, Ltd. Telegroup, Inc. Applications for Authority Under Section 214 of the Communications Act of 1934, as amended, to operate as International Resale Carriers*, 9 FCC Rcd 2288, 2288 n.5 (1994). The Fifth Circuit, in contrast, understood "callback" services to involve only those calls where a Mexican customer would dial an I800 number to a provider other than Telmex, and that company would obtain the number from which the customer was calling without answering

tinguishable from this one, the Texas Court of Appeals has held that this use of I800 service to allow Mexican consumers to call the United States without using Telmex as their provider is "illegal" under the "the relevant Mexican laws and regulations and . . . [Mexican Secretary of Communications and Transportation] interpretations." *Long Distance Int'l, Inc. v. Telefonos de Mexico, S.A.*, No. 04-98-00873-CV, 2000 Tex. App. LEXIS 686, at *23 (Tex. Ct. App.—San Antonio Jan. 31, 2000), *petition for review pending* (Tex. filed Apr. 20, 2000).

2. ATI's complaint in this case alleges that SBC and/or Telmex demanded that MCI provide them the I800 numbers that ATI was using to evade Telmex's exclusive concession. ATI further contends that, upon receiving those numbers from MCI, Telmex blocked Mexican consumers from completing calls to ATI, thus preventing ATI from providing its service. *See* ATI First Am. Compl. ¶ 15. ATI claims that these alleged actions by defendants Telmex, the SBC entities, and MCI violate the Sherman Act, as well as various aspects of Texas law.

The district court rejected all of ATI's legal claims. After initially dismissing Telmex from the case for lack of personal jurisdiction (Pet. App. 165a-199a), the court granted summary judgment to both the SBC entities and MCI (*see id.* at 43a-59a, 60a-90a).

In rejecting ATI's Sherman Act claims against the SBC entities, the district court explained that ATI's claim failed a

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the call. The provider would then place a separate call to the Mexican customer and connect that customer to the number in the United States or another country that the customer wished to reach. *See* Pet. App. 3a. Contrary to the Fifth Circuit's understanding, the consequences to Telmex of both of these methods are the same: it receives only an international settlement payment from the I800 provider (*e.g.*, MCI) and not its tariffed rate for international calls.

threshold test under that federal law: ATI had not shown that the conduct at issue had "'some substantial effect in the United States.'" *Id.* at 54a (quoting *Hartford Fire*, 509 U.S. at 796); *see also* 15 U.S.C. § 6a. The district court emphasized in this regard that "[a]ll the activities of Telmex of which ATI complains occurred outside the United States. Moreover, the market from which ATI alleges to have been excluded by Telmex is the I-800 service market in Mexico, outside the United States." Pet. App. 55a (internal quotation marks omitted). The court further stressed that the "economic consequences of Telmex and the other defendants terminating ATI's I-800 service w[ere] felt predominately in Mexico by Mexican consumers." *Id.* at 58a.

The district court applied the same analysis in granting summary judgment to MCI. *Id.* at 85a-90a. In a related order denying ATI's request for partial summary judgment, the district court also concluded, after an exhaustive review of the relevant evidence and authorities (*see id.* at 101a-160a), that ATI's activities were, in fact, illegal under Mexican law. *See id.* at 161a.

C. The Fifth Circuit Decision.

1. The Fifth Circuit reversed the district court as to the Sherman Act issue (as well as the state law claims). In resolving the Sherman Act issue, the court of appeals first disagreed with the district court as to the threshold question whether the conduct alleged by ATI had a substantial effect on a United States market. *Id.* at 23a. Conceiving of ATI's service as the "export" of "U.S. telephone switching services to . . . Mexican customers," the court concluded that this was a "definite and sizable export market" and that the conduct alleged was "aimed at shutting down this market." *Id.* at 23a-24a. The court thus believed that ATI had sufficiently demonstrated, for purposes of summary judgment, that there was a "significant effect on a U.S. export market." *Id.* at 24a.

The only other question that the Fifth Circuit believed it needed to decide to allow ATI's federal claim to proceed was whether ATI's conduct was actually *illegal* in Mexico: "[F]oreign countries may make laws or create monopolies that effectively and completely exclude U.S. import competition." *Id.* at 24a-25a. In this case, the court concluded that ATI had found a loophole in Mexican law. The court acknowledged that "a government concession or permit was required in order to provide telecommunications services in Mexico" and that "ATI had no permit." *Id.* at 26a. The court believed, however, that no Mexican law expressly prevented the particular scheme that ATI had concocted to circumvent Mexico's exclusive concession policy. To the court, ATI had found a unique way of evading Telmex's exclusive concession. *See id.* at 29a ("because ATI's method was novel, it is unrealistic to read the older Mexican law as covering the service").

Having decided that the service was not illegal, the Fifth Circuit did not find it necessary to engage in any further international comity analysis to determine whether ATI's Sherman Act claim could proceed. Rather, the court held that, so long as Mexico had not determined that this precise activity was illegal, a Sherman Act suit could be maintained: "[W]e find ATI's activity in Mexico to be legal during the time in question. Thus it was improper to dismiss ATI's state and federal antitrust claims . . . . It is argued that this application of the export exception circumvents the principle that antitrust laws do not extend to other nations' competitive rules. This would only be true if the legality of the export-import business were not taken into consideration, which it has been." *Id.* at 30a-31a (citation omitted).

2. The SBC entities, Telmex, and MCI sought rehearing and/or rehearing *en banc* from the panel decision. The Secretary of Communications and Transportation of Mexico and the Federal Telecommunications Commission of Mexico

jointly filed an *amici* brief in support of rehearing. That brief emphasized both that the court had misread Mexican law, which *does* prohibit ATI's service, and that, in any event, international comity considerations dictated that ATI's suit should not be permitted to proceed. *See* Mexican Telecommunications Authorities *Amici* Brief at 2 ("The Court's decision impinges on Mexico's sovereignty, undermines *amici*'s authority, and encourages illegal activity in Mexico."); *id.* at 5-6 ("the decision undermines the [Secretary of Communications and Transportation's] policy judgments about how to transition from a telecommunications monopoly to a competitive market"). Despite the significant concerns raised by these representatives of a foreign sovereign, the Fifth Circuit denied rehearing. *See* Pet. App. 40a-41a.

REASONS FOR GRANTING THE PETITION

THE FIFTH CIRCUIT'S FAILURE TO CONSIDER INTERNATIONAL COMITY CONCERNS IN ITS SHERMAN ACT ANALYSIS RAISES AN IMPORTANT QUESTION THAT THIS COURT HAS PREVIOUSLY RESERVED AND IS CONTRARY TO THE DECISIONS OF OTHER COURTS OF APPEALS.

For many decades, the federal courts have emphasized the importance of interpreting our Nation's laws in a manner that grants respect and comity to the interests of other sovereign countries. Thus, this Court "ha[s] long recognized the demands of comity in suits involving foreign states, . . . as sovereigns with a coordinate interest in the litigation." *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 546 (1987); *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.) (stating in Sherman Act case that "we are not to read general words [in statutes] . . . without regard to the limitations customarily observed by nations upon the

exercise of their powers"). The deeply rooted concern that application of United States law not unduly impinge on the legitimate interests of other sovereigns is even more important today, in this age of a single, interdependent world economy.

This case presents an opportunity to clarify the application of principles of international comity to one of our Nation's most important pieces of economic legislation, the Sherman Act. The Fifth Circuit determined here that, so long as the conduct at issue was not actually illegal under foreign law, a Sherman Act case could proceed. *See* Pet. App. 30a ("[W]e find ATI's activity in Mexico to be legal during the time in question. Thus it was improper to dismiss ATI's state and federal antitrust claims."). The court made no effort in its Sherman Act analysis to consider the variety of international comity factors—for instance, the Mexican interest in maintaining its sovereign authority to regulate one of the most important areas of its economy, the fact that the alleged anti-competitive conduct (the blocking of I800 calls originating in Mexico) could occur only in Mexico, and the attenuated nature of the United States' interest in a market where all consumers are, by definition, not in the United States—that should inform a determination whether Congress intended the Sherman Act to apply here.

As we now explain, the failure to consider such concerns conflicts with the views expressed by four Justices of this Court and with the decisions of other courts of appeals. Finally, this case presents especially clearly the kinds of international comity concerns that other courts have found significant to Sherman Act analysis and that the Fifth Circuit failed to consider. For all these reasons, the petition should be granted.

A. Four Justices of this Court, Speaking in a Case Where the Majority Declined To Decide the Question, Have Advocated a Position Contrary to the Decision Below.

In *Hartford Fire Insurance Company v. California*, a case that involved an alleged conspiracy to control the terms under which consumers in the United States obtained insurance, a five-Justice majority of this Court declined to decide whether and to what extent international comity concerns limit the extraterritorial application of the Sherman Act. *See* 509 U.S. at 798. The Court majority stated that, on the facts of that case, it "need not decide" the comity question. *Id.* Even if "in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct," that issue was not presented there, where the *only* "substantial question" presented by the parties was whether there was a "'true conflict between domestic and foreign law'"—that is, whether the conduct required of the defendants under the Sherman Act would be illegal under another country's laws. *Id.* (quoting *Societe Nationale*, 482 U.S. at 555 (Blackmun, J., concurring in part and dissenting in part)). Finding no true conflict, the Court did not decide the question of the appropriate role of international comity in Sherman Act analysis. *See id.* at 799 ("We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity."). This Court has thus never squarely determined whether a federal court must weigh considerations of international comity before determining whether a Sherman Act claim may proceed.

However, Justice Scalia, writing for the four dissenting Justices in *Hartford Fire*, did address the question of international comity. Justice Scalia, joined by Justice O'Connor, Justice Kennedy, and Justice Thomas, acknowledged that the Sherman Act applies extraterritorially

(*see id.* at 814 (Scalia, J., dissenting)), but explained that principles of what Justice Scalia termed "prescriptive comity"—that is, "the respect that sovereign nations afford each other by limiting the reach of their laws"—nevertheless must be "part of determining whether the Sherman Act prohibits the conduct at issue" (*id.* at 817-18).

In Justice Scalia's view, before determining whether the Sherman Act applies, a federal court must "take[ ] account of foreign regulatory interests" by determining whether the exercise of United States' antitrust jurisdiction is "'unreasonable.'" *Id.* at 818 (quoting *Restatement (Third) of Foreign Relations* § 403(1)). To determine the "reasonableness" of exercising Sherman Act jurisdiction, the courts should consider, among other things, "'the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted'"; "'the extent to which the activity takes place within the territory [of the regulating state]'"; "'the connections . . . between the regulating state and the person principally responsible for the activity to be regulated'"; and the "'extent to which another state may have an interest in regulating the activity.'" *Id.* at 818-19 (quoting *Restatement (Third) of Foreign Relations* § 403(2)). Applying that test in *Hartford Fire*, Justice Scalia explained that, where another country has "established a comprehensive regulatory scheme governing" the activities at issue and has a "heavy interest in regulating [that] activity," and the countervailing United States antitrust interest is weak, it is "inappropriate to assume" that Congress intended the Sherman Act to apply. *Id.* at 819.

This case presents the issue discussed by the dissenters in *Hartford Fire* and expressly reserved by the majority in that case. While the issue of "true conflict" may have been the

only "substantial question" presented in *Hartford Fire*, that is not so here. Unlike *Hartford Fire*, which involved an alleged attempt to control insurance terms *in the United States*, this case requires the balancing of a foreign country's interest in policing *its own markets*. Moreover, as we discuss further below, the market at issue—telecommunications—is one of the most central to any country's economic well-being, and that market is heavily regulated by the government in Mexico, as it is in the United States and most other countries. For these and other reasons, this case presents substantial questions under nearly all of the comity factors discussed by Justice Scalia. Whether or not those factors would ultimately lead to a result different from that reached by the Fifth Circuit—as we believe it would—these are plainly significant issues that the Fifth Circuit should have addressed under Justice Scalia's approach in *Hartford Fire*.

B. The Fifth Circuit's Failure To Consider International Comity Conflicts with the Decisions of Other Courts of Appeals.

In stark contrast to the Fifth Circuit's decision here, several courts of appeals have also recognized that federal courts must weigh international comity concerns in determining the scope of the Sherman Act's application. Indeed, in concluding that international comity analysis is a necessary part of determining whether the Sherman Act applies to specific conduct, Justice Scalia cited a series of prior court of appeals decisions that have "tempered the extraterritorial application of the Sherman Act with considerations of 'international comity.'" 509 U.S. at 817 (citing *Timberlane I*, 549 F.2d at 608-15; *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294-98 (3d Cir. 1979); *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864, 869-71 (10th Cir. 1981); and *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 938 & n.109 (D.C. Cir. 1984)).

Justice Scalia rightly found the Ninth Circuit's case law "especially" supportive (*id.* at 818) of the understanding that international comity analysis is necessary in the Sherman Act context. In *Timberlane I*, the Ninth Circuit emphasized that, in determining the extraterritorial reach of the Sherman Act, a court could not limit its analysis to whether conduct has an effect on United States markets, because "'[a]nything that affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for others than for the United States.'" 549 F.2d at 611 (quoting Katzenbach, *Conflicts on an Unruly Horse*, 65 Yale L.J. 1087, 1150 (1956)). Accordingly, the extraterritorial application of the antitrust laws could be justified only after considering "whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Id.* at 613. In weighing those competing interests, the Ninth Circuit determined that it was appropriate to look to the same kinds of factors later discussed by Justice Scalia, including such things as the degree of "conflict with foreign laws *and* policies" and the "relative significance of the effects on the United States as compared with those elsewhere." *See id.* at 614 & n.31 (emphasis added); *see also Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 749 F.2d 1378 (9th Cir. 1984) ("*Timberlane II*"), *cert. denied*, 472 U.S. 1032 (1985).

After *Hartford Fire*, the Ninth Circuit has continued to require consideration of international comity to determine the reach of the Sherman Act. In *Metro Industries, Inc. v. Sammi Corp.*, the Ninth Circuit again concluded that a court must consider the international comity concerns that had been discussed in the *Timberlane* cases. *See* 82 F.3d at 845-47. Indeed, the court of appeals specifically noted that *Hartford*

Fire "did not question the propriety" of "the seven comity factors set forth in *Timberlane I*," but rather held only that, absent a true conflict of laws, foreign governmental "encourage[ment]" of the acts in question was not sufficient *by itself* to establish a comity bar to Sherman Act jurisdiction. *Id.* at 846 n.5; *see also* 1 W. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.13, at 98 (5th ed. 1996) (the "*Timberlane* comity approach" survives *Hartford Fire*).[4]

While the law on this point is most developed in the Ninth Circuit, other circuits have adopted similar standards, as Justice Scalia noted. *See Mannington Mills*, 595 F.2d at 1297 (Third Circuit states that it is in "substantial agreement" with the Ninth Circuit's enumeration of international comity factors that should be considered); *Laker Airways*, 731 F.2d at 938 (D.C. Circuit states that "comity may have a strong bearing on whether application of United States antitrust laws should go forward") (footnote omitted). The Department of Justice and the Federal Trade Commission have similarly taken the view in their own enforcement guidelines that, in performing a comity analysis, agencies should "take into account all relevant factors," including eight specific considerations that are similar to those discussed in *Timberlane I*. *See Antitrust Enforcement Guidelines for International Operations* § 3.2 (Apr. 1995) (available at http://www.usdoj.gov/atr/public/guidelines/internat.htm).

At least one court of appeals, however, has expressed the view that, in the wake of *Hartford Fire*, comity concerns exist under the Sherman Act only where there is a "true conflict" between United States law and the law of another nation. *See*

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[4] In a bankruptcy case, the Ninth Circuit referred to the "general principles" of comity that ordinarily limit that doctrine to "true conflict" cases. *See In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998) (citations omitted), *cert. denied*, 525 U.S. 1141 (1999). That statement does not affect the fact that Ninth Circuit law remains that, under the Sherman Act, the *Timberlane* comity analysis generally survives *Hartford Fire*.

United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997) (the "growth [of comity doctrine] has been stunted by *Hartford Fire*, in which the Court suggested that comity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of the foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible"), *cert. denied*, 522 U.S. 1044 (1998); *see also United Int'l Holdings, Inc. v. The Wharf (Holdings) Ltd.*, Nos. 97-1421, 98-1002, 2000 U.S. App. LEXIS 8487, at **32-33 (10th Cir. Apr. 28, 2000) (citing *Hartford Fire* in stating in a securities case that, "[i]n general, we will not consider an international comity or choice of law issue unless there is a 'true conflict' between United States law and the relevant foreign law"); *In re Maxwell Communications Corp.*, 93 F.3d 1036, 1049 (2d Cir. 1996) (stating in a bankruptcy case that, under *Hartford Fire*, "[i]nternational comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction"). Indeed, the law in the Fifth Circuit also appears to have been affected by *Hartford Fire*, as, in contrast to the present case, that court did discuss the *Timberlane* comity factors in a pre-*Hartford Fire* Sherman Act case. *See Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 885 (5th Cir. 1982), *vacated*, 460 U.S. 1007, *on remand*, 704 F.2d 785 (5th Cir.), *cert. denied*, 464 U.S. 961 (1983). These conflicting understandings of *Hartford Fire* provide another reason to grant certiorari.

C. The Fifth Circuit's Failure To Consider International Comity Issues Was Particularly Misguided in the Context of this Case.

By itself, the fact that this case raises an important issue that this Court has reserved and as to which the courts of appeals are divided provides a sufficient reason to grant certiorari. That course of action is all the more warranted because this case presents especially clearly the kinds of international comity concerns that the Fifth Circuit never considered in its Sherman Act analysis.

It is beyond dispute that all sovereign nations have a substantial interest in regulating their own communications markets—markets that are especially critical to economic development in the information age. It is also plain that Mexico's chosen policy for developing those markets was to grant an exclusive concession to a carrier for a limited period of time in exchange for substantial commitments to build and to improve the Mexican telecommunications infrastructure.

The Fifth Circuit's decision strikes at the core of that policy. Under this decision, when a Mexican company allegedly acts to protect the exclusive concession granted in its bargain with the Mexican government, its actions are not judged under Mexican law and policy, but by a United States court applying the potentially different policies of the Sherman Act. At bottom, therefore, this case is about who will determine what is best for *Mexican* consumers—the representatives of the sovereign Mexican government or a United States federal court.

It is no answer to that argument to suggest that the Fifth Circuit determined that ATI's conduct was not illegal in Mexico. Even if one were to assume that ATI had found a loophole in Mexican law—a conclusion that is contrary both to the expert judgment of the Mexican authorities that filed an *amici* brief in support of rehearing below and to the holding

of the Texas Court of Appeals in an indistinguishable case—that does not mean that Mexico no longer has an interest in acting as the exclusive regulator of telecommunications originating on its soil. If it was improper for Telmex to protect the exclusive government-granted concession by the means alleged here, there is no reason to believe that Mexican regulatory and/or judicial tribunals are not open to hear such claims. And allowing those bodies, which obviously have far greater expertise in Mexican law, to resolve such matters would also have the beneficial effect of preventing a United States court from determining issues central to Mexican policy based on its own best guess as to the content of Mexican law. *Cf. In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (United States courts must defer to interpretation of foreign law presented by a foreign country).

Nor can the Fifth Circuit's conclusion be justified on the basis that Mexico has no legitimate interest in protecting Telmex's exclusive concession when calls originate in Mexico but terminate in other countries. *See, e.g.*, Pet. App. 30a-31a (interpreting Mexican law in light of this alleged limitation on Mexico's legitimate interests); *see also* Pet. App. 12a, 16a (court stresses the illegitimacy of Mexico's interest in the course of making choice of law determination for state law claims). In fact, Mexico has an overriding interest in determining which companies will be able to provide telecommunications service to consumers in Mexico, whether those calls terminate in Mexico, the United States, or anywhere else. That interest is particularly strong here, where, as noted, ATI's actions deprive Telmex of the revenues to which it is entitled under its bargain with the Mexican government and shift those revenues to a company that has made no commitment to expand or to improve telecommunications service in Mexico.

That significant Mexican interest cannot be nullified by suggesting, as the Fifth Circuit did, that the service in question is really the "export [of] reorigination services" from the United States. *Id.* at 24a. As the Fifth Circuit itself recognized, "[n]o matter how ATI's business is described, the end result enabled *Mexican* consumers to make long distance phone calls in Mexico for prices less than those generally charged by the Telmex monopoly." *Id.* at 6a (emphasis added). There is nothing illegitimate about the Mexican government ensuring that foreign companies respect, as to both domestic and international calls from Mexico, the temporary monopoly that it has granted as part of a coordinated attempt to enhance telecommunications in Mexico. Indeed, contrary to the Fifth Circuit's analysis, under United States communications law, it is the business of foreign regulators, *not* the United States, to superintend the rates that foreign carriers charge foreign consumers for calls made from abroad to the United States. *See Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999) ("We thus hold that the Commission's Order *does not regulate foreign carriers or foreign tele-communications services and therefore does not violate the Communications Act.* For the same reason, we reject petitioners' claim that the Order violates the doctrine of 'half-circuit jurisdiction,' which allows the Commission to exercise jurisdiction over international calls only from a point within the United States to the midpoint between the United States and the foreign country.") (emphasis added); *see also* Report and Order, *International Settlement Rates*, 12 FCC Rcd 19806, 19819, ¶ 29 (1997).

Finally, the Fifth Circuit's decision is also particularly unfortunate because the United States' interest in the conduct alleged here is so attenuated. First, as we have emphasized, there is simply no United States consumer interest here, because the service at issue was marketed only in Mexico.

Since "Congress designed the Sherman Act as a consumer welfare prescription" (*Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (internal quotation marks omitted)), that fact is surely relevant to any determination whether Congress would have intended to authorize suit on these facts. Moreover, any supposed effect on United States competitors is, at best, barely sufficient to clear the statutory threshold of a direct and substantial effect on competition. In this case, a single company with $3 million in revenues was affected by Telmex's alleged actions and, even under the Fifth Circuit's analysis, that company's actions were made illegal shortly thereafter under a new Mexican law. *See* Pet. App. 23a-24a, 28a. That is hardly the kind of overwhelming United States interest that should justify this intrusion into a core area of Mexican policy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 98-50881

ACCESS TELECOM, INC.,
Plaintiff-Appellant,

v.

MCI TELECOMMUNICATIONS CORPORATION;
MCI INTERNATIONAL, INC.; SBC COMMUNICATIONS, INC.;
SBC INTERNATIONAL, INC.; SBC INTERNATIONAL LATIN
AMERICA; TELEFONOS DE MEXICO,
Defendants-Appellees.

Dec. 1, 1999

Appeal from the United States District Court
for the Western District of Texas

Before REYNALDO G. GARZA, HIGGINBOTHAM and DAVIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

I.

During 1993 and 1994, Access Telecom, Inc. (ATI), a corporation based in Texas, exported U.S. phone services to customers in Mexico. These services allowed Mexican customers to place U.S.-based phone calls directly from Mexico. Customers first called ATI in Texas and then entered the new phone number they wanted to call. ATI dialed that new number from the U.S. and effectively spliced the customer's first call to the new call, enabling the customer to communicate with the new destination. As a result, each call had two legs:

the Mexican leg from Mexico to Texas and the U.S. leg from Texas to the final destination.[1]

The benefit to ATI's customers from this arrangement was that the cost of the two-legged call was less than the cost of a normal call from Mexico through Telefonos de Mexico (Telmex). The price discrepancy existed because Telmex had a government granted monopoly until 1996. Thus, the rate øn a typical call from Mexico to California was controlled by Telmex for its entire length. Under ATI's setup, Telmex controlled only the rate for the Mexican leg of the call. The applicable rate for the U.S. leg of the call was a U.S. rate.

The Mexican leg of each call was carried on toll free numbers that ATI received from MCI. MCI in turn leased the lines for these numbers from Telmex. In other words, MCI leased the Telmex lines that connected Mexico to Texas. Telmex's lines crossed the border into Texas where they interconnected with U.S. lines. Telmex's contracts with MCI apparently neither foresaw nor forbid the subsequent "reorigination" as practiced by ATI or other companies, and in fact, MCI offered similar reorigination services of its own.

ATI's contracts with MCI incorporated the terms and conditions of MCI's U.S. "filed tariff" which provided that MCI calls may not be acquired and used for resale in foreign jurisdictions once MCI's foreign partners have blocked or interrupted MCI or have threatened to do so for such reasons. The tariff also stated that MCI was not liable for acts or omissions of other companies who furnished a portion of MCI's 800 service. Finally, the tariff prohibited the use of MCI services for unlawful purposes.

Mexican law required a permit to be a provider of telecommunications services in Mexico. ATI never obtained such a permit, maintaining it did not need to do so because it

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[1] At some point, ATI also employed switching services in New York.

was not a provider. Under ATI's interpretation of Mexican law, a provider was an entity that both owned and operated telecommunications infrastructure within Mexico, which ATI did not do (as opposed to reselling service directly or indirectly, which ATI perhaps did do). Subsequent to the time period relevant in this lawsuit, Mexico revamped its telecommunications laws and now explicitly requires a permit to engage in resale activity.

In October 1993, Jose Rivas Moncayo of the office of the Mexican Secretary of Communications and Transportation (SCT), sent MCI a letter requesting that MCI halt the services of companies offering "call-back services." Call-back involved a procedure whereby a customer called a U.S. company, and the U.S. company did not answer the call. Instead, the company would use a form of caller-id to locate the customer and then call the customer back. Under call-back services, Telmex received no revenue for the initial outbound call because that call was never "answered." Such services used Telmex phone lines to communicate location information without paying Telmex anything for that privilege. ATI's service, however, paid Telmex exactly what Telmex had contracted with MCI to receive for outbound calls using the lines from Mexico to Texas. ATI's service did not operate through call-back, and MCI did not terminate ATI's service. Subsequent to the time period relevant in this lawsuit, the SCT issued further communications condemning practices that achieve similar results as "call-back" services.

On April 19, 1994, Telmex notified MCI of its intention to disconnect customers who were using its service for resale. The list of 85 customers that it provided, however, did not include ATI. On April 29, 1994, MCI received another letter, requesting a list of customers in the resale business, but MCI refused to provide such a list. The letter requesting customers was written on Telmex letterhead by an employee of SBC International, a subsidiary of Southwestern Bell. South-

western Bell is part of a consortium that owns a controlling stake in Telmex.

Telmex allegedly began disconnecting 800 numbers on July 21, 1994, without warning. Previously it had assured MCI that it would give notice of disconnection so MCI could warn MCI's customers. On September 28, 1994, Telmex sent MCI a list of prohibitions on the use of MCI's numbers, threatening to terminate all of MCI's Mexican business without notice if MCI did not cooperate. ATI's numbers, save three, were disconnected on October 19, 1994; the rest were disconnected soon thereafter. At this time, ATI was earning approximately $3 million a year.

There is disagreement whether MCI provided Telmex with ATI's numbers. According to the deposition of Carol Ansley, an SBC employee, Ansley sent Rafael Perez Aguilar of Telmex a list of ATI's numbers, and Ansley testified that as far as she knew, MCI had not provided SBC with ATI's numbers. ATI, however, discovered a cover memo written by Ansley, stating that "attached you will find a list of I-800 numbers MCI has identified as being with Access Telecom."ATI also notes that John Bachman, an MCI manager, sent an e-mail on October 18, to an MCI employee, Laura Alvarado, instructing her to "take down" ATI's numbers. In Alvarado's deposition, however, she insists that she did not provide the numbers to Telmex. Even MCI has stated that the provision of ATI's numbers to third parties without permission would be in violation of U.S. law.

In an effort to continue providing service to its customers, ATI sought alternative service from AT&T. According to ATI, MCI immediately informed SBC and Telmex of ATI's attempt to obtain service from AT&T. Telmex allegedly assured MCI that ATI would not be able to reestablish the numbers through AT&T. ATI ultimately could not obtain alternate service through AT&T. ATI's business collapsed, along with approximately 80 other similar U.S. companies.

II.

In June 1995, MCI commenced arbitration proceedings seeking to recover payment of ATI's phone bill, ultimately receiving an award for nearly $1.2 million. In July 1995, ATI sued Telmex, SBC, and MCI in Texas state court, alleging claims of breach of contract, tortious interference with contract, negligent misrepresentation, promissory estoppel and federal and state antitrust violations. The case was removed and transferred to the Western District of Texas. The federal court granted Telmex's motion to dismiss all claims against it for lack of personal jurisdiction.

ATI moved for partial summary judgment on the issue of the lawfulness of its activities, which the district court denied. MCI and SBC moved for summary judgment on all of ATI's claims, which the district court granted. The court held that the filed tariff doctrine barred ATI's claims for negligent misrepresentation and breach of contract. The district court granted summary judgment on a promissory estoppel claim, holding that ATI could not justifiably rely on representations by MCI as to Mexican law.

The district court also held that ATI could not recover on its claim alleging that MCI tortiously interfered with ATI's customer contracts because this was essentially a breach of contract claim and was barred by limitation of liability provisions in MCI's tariff. In addition, the court rejected ATI's claim that MCI conspired with Telmex and SBC to block ATI from contracting with AT&T for service because ATI never sought or obtained a permit from the SCT and thus ATI's prospective relations with AT&T would have been illegal. Finally, the district court rejected ATI's antitrust claims on the ground that the conduct of which ATI complained did not have a direct, substantial, and reasonably foreseeable effect on U.S. domestic or import commerce or export business.

On appeal, ATI challenges the dismissal of its tortious interference and antitrust claims, the denial of summary judgment in ATI's favor with respect to the lawfulness of ATI's activities, and the dismissal of Telmex on personal jurisdiction grounds. ATI separately complains that merits discovery was improperly limited.

III.

A. Characterization of ATI's Business

The proper resolution of many issues in this case depends on the characterization of ATI's business. ATI characterizes its business as exporting U.S. reorigination services to Mexican customers. The defendants characterize ATI's business as providing a Mexican telecommunications service in Mexico. At first glance, the defendant's characterization has appeal. No matter how ATI's business is described, the end result enabled Mexican customers to make long distance phone calls in Mexico for prices less than those generally charged by the Telmex monopoly. This characterization, however, confuses the ends with the means.

In the past, phone calls may have been seen as indivisible commodities. Today, that is too simple a view. Admittedly, by selling the "U.S. leg" of a call to Mexican customers, ATI enabled cheaper long distance communication. That is not the same as being a Mexican telecommunications provider. A distinction exists between "provider" and "reseller," which is easier to see in a more familiar context.

If ATI and Telmex were shipping companies, ATI might transport goods solely between U.S. cities. If Mexican customers shipped their goods to ATI in Texas, ATI could then transport them to another destination in the U.S. Alternatively, Mexican customers could ship directly to their final destination using Telmex alone. Shipping to New York via ATI might be cheaper, however, than shipping via Telmex.

To say that ATI is a Mexican shipping provider would be imprecise. No matter which company the customer uses, Telmex, as a monopoly, is the only provider of shipping service from Mexico to Texas, and in every instance Telmex receives the previously agreed rate for its services. Thus, in Mexico, ATI is at most a reseller of Telmex's shipping service, although even the label of "reseller" is debatable.

To equate resale with provision, however, entails that every business is a provider if that business ships goods to its customers via Telmex and charges the customer for the shipping cost. In our case it would entail that every business which has a toll free number, yet which charges the cost of the phone service back to the customers, is a telecommunications provider because it technically is "reselling" phone service. This ignores the crucial difference between resellers and providers, which is that a reseller cannot compete with a monopoly provider because the provider is the reseller's only supplier. The reseller can only undersell the provider if the provider sells its services to the reseller for less than they are worth. That is not the same kind of competition a provider faces against another provider. Competition between the provider and the reseller is at the mercy of the provider and the provider's knowledge or ignorance of the market.

Because of this difference, it is more appropriate to characterize ATI as an exporter of U.S. phone services who incidentally and indirectly resold Mexican telecommunications services. In a real sense, ATI was not even the primary reseller of Mexican telecommunications services. MCI was the reseller, under contract from Telmex. ATI purchased MCI's services and MCI billed ATI for the calls made to ATI's numbers by ATI's customers who were purchasing U.S. service. ATI may have recouped the cost of the Mexican leg of the call from its customers just as any other business may recoup the cost of toll free phone service through its service fees. ATI's setup is thus the same as any American business which

contracted to offer toll free 800 numbers to Mexican customers in order to provide service across the phones, such as touch tone brokerage service or even $3.95/minute astrological advice. The only difference is that ATI offered U.S. phone service rather than another service delivered by phone. While this may make ATI appear to be a Mexican "provider," this ignores the foregoing distinctions. To not distinguish between direct providers, direct resellers, and indirect resellers ignores the competitive reality that it is the providers who determine whether subsequent resales are profitable; it also leads to the illogical result that all businesses are telecommunications providers. This characterization of ATI's business is compatible with one interpretation of the laws which were in place in Mexico at the time, requiring permits only for the joint installation, operation, and exploitation of infrastructure. ATI's claim that the "and" has its normal conjunctive meaning agrees with these distinctions, because this reading separates true providers from mere resellers. With these distinctions in mind, we now address the tortious interference issues.

B. Tortious Interference

1. Choice of Law

To properly decide the tortious interference issues, we must make three choice of law decisions: first, which law governs ATI's tort cause of action; second, which law governs the validity of the contracts and prospective business relations which form the basis of the tortious interference claims; and third, whether any foreign law invalidates the contracts for other reasons. A federal district court must follow the choice-of-law rules of the state in which it sits. *See, e.g., St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 205 (5th Cir. 1996).

(a) Tort Choice of Law

The first choice is which law governs ATI's tort cause of action. Texas follows the most significant relationship test of the Restatement (Second) of Conflict of Laws § 145, for these decisions. *See Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). Under the modern "most significant relationship" test, courts considers: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship between the parties, if any, is centered. *See SnyderGeneral Corp. v. Great Am. Ins.*, 928 F. Supp. 674, 677 (N.D. Tex. 1996), *aff'd*, 133 F.3d 373 (5th Cir. 1998). Since Texas was the site of injury, home to the injured business, and place of export of the U.S. portion of the business, it would be reasonable to apply Texas law; however, the parties appear to assume without argument that Texas law governs, and so, without deciding, shall we.

Thus, we examine Texas law to determine the requirements for a tortious interference claim. Under Texas law, the existence of a valid contract (or the potential for one in claims for interference with prospective contracts) is an element of a claim for tortious interference. *See Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*, 793 S.W.2d 660, 665 (Tex. 1990). There is no remedy for interference with illegal contracts, *see Ben E. Keith Co. v. Lisle Todd Leasing, Inc.*, 734 S.W.2d 725, 727 (Tex. App. - Dallas 1987, writ ref'd n.r.e.).

(b) Contract Choice of Law

The ATI contracts at issue in this case include ATI's contracts with its Mexican customers, ATI's contracts with MCI, and ATI's attempted contracts with AT&T. The second choice of law question arises because we must determine whether these contracts were valid. Validity of a contract, however, is determined by the law which governs the con-

tract, which calls for another choice of law analysis, this time using the modern "most significant relationship" test of the Restatement (Second) of Conflict of Laws as applied to contracts, which Texas has adopted. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984).

ATI, based in Texas, exported Texas reorigination services to Mexican customers and resold Mexican telecommunications service. These customer contracts had choice of law provisions identifying Texas as the applicable law and place of formation. In Texas, contractual choice-of-law provisions are ordinarily enforced if the chosen forum has a substantial relationship to the parties and the transaction. *See De Santis v. Wackenhut*, 793 S.W.2d 670, 677-78 (Tex. 1990). However, a choice-of-law provision will not be applied if another jurisdiction has a more significant relationship with the parties and their transaction than the state they choose, that jurisdiction has a materially greater interest than the chosen state, and the jurisdiction's fundamental policy would be contravened by the application of the law of the chosen state. *See* Restatement (Second) of Conflict of Laws § 187.

The defendants argue that the choice of law clauses in the ATI customer contracts are not determinative, because these contracts concerned issues of payment and formation, mostly stating that the contracts were formed in Texas and would be payable in Texas in U.S. dollars. The contracts did not concern the terms of ATI's actual provision of service. It is true that contractual choice of law clauses are construed narrowly. *See Thompson and Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429 (5th Cir. 1996). However, the defendants' argument cuts both ways. To the degree that these contracts do not concern the services allegedly illegal in Mexico, it becomes harder to argue illegality of those contracts under Mexican or Texas law; furthermore, so long as these contracts were interfered with, the fact that a separate service agreement was not interfered with does not matter,

since the interference claim only needs one contract as its basis.

Without deciding how determinative the choice of law clauses are, however, it appears that there is no demand to choose Mexican over Texas law under a most significant relationship test. The Restatement § 188 states that

> [i]n the absence of an effective choice of law by the parties ... the contracts to be taken into account ... to determine the law applicable to an issue include: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

In this case, we have a very symmetric relationship between the parties and the services provided. Each forum is home to one of the parties, one forum's business is exporting services, the other forum's resident is receiving services, the U.S. favors competition in telecommunications, Mexico at the time did not. ATI's indirect resale of the Mexican leg of the service may center in Mexico, but even a portion of that service occurs in Texas, since Telmex's lines cross into Texas and interconnect at the border. Further, that service was provided by MCI under agreements with Telmex and ATI, and the ATI-MCI agreements were entered into in Texas. Even assuming the Mexican leg of the calls implicates Mexican interests more than Texas interests, the remaining contacts that ATI's contracts had with Texas, including the choice of law clause which is of some weight, is at least a deciding factor in such a close case.

This makes sense if one looks at the fundamental policies involved, which include Mexico's interest in a domestic telephone monopoly. Mexico would not have a fundamental policy contravened by the application of Texas law in this case.

The export of U.S. telecommunication services and even the resale of Mexican services does not contravene Mexico's legitimate monopoly over its domestic lines. Telmex can charge whatever it likes for incoming and outgoing calls on its lines. The resale of the Mexican leg either directly by MCI or indirectly by ATI is only profitable if Telmex allows it to be. If Telmex sets a monopoly price for its initial service, Telmex recoups all potential monopoly revenues from that fee. Telmex may wish to use its monopoly as leverage in order to gain higher revenues from the U.S. leg of calls, but attempts to tie domestic monopoly power into the international market is not within the scope of the domestic monopoly. As such, it is not a Mexican interest which tips the scale in Mexico's favor.

Texas, on the other hand, would have a fundamental policy contravened by the choice of Mexican law (assuming Mexican law is different on the question of contract validity), namely the ability of Texas companies to make valid export contracts in Texas for the sale of U.S. services.

The remaining contracts and prospective contracts are more obviously governed by Texas law. ATI's contracts with MCI were negotiated and entered into in Texas, between Texas businesses. ATI's potential contracts with AT&T presumably would have been similar. In this case, Mexico's only connection with these contracts is the fact that the contracts involve the use of Mexican lines for a portion of the calls. Given the fact that the parties are in the U.S., the contracts were made in the U.S., and that there is no claim that these contracts were illegal under Mexican law, there seems to be no reason to choose Mexican law to determine the validity of these contracts, despite the fact that part of their subject matter existed in Mexico.

We hold, then that Texas law determines the validity of the contracts and prospective contracts at issue in this case. However, this is still not the end of the analysis.

(c) Foreign Law Which Invalidates Contract Under Texas Law

Under Texas contract law, it is "well settled" that "[a] contract made 'with a view of violating the laws of another country, though not otherwise obnoxious to the laws either of the forum or of the place where the contract is made,' is illegal and 'will not be enforced.'" *See Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 639 (Tex. App. - San Antonio 1993, writ denied) (quoting *San Benito Bank & Trust Co. v. Rio Grande Music Co.*, 686 S.W.2d 635, 638 (Tex. App. - Corpus Christi 1984, writ ref'd n.r.e.)).

This rule has not been analyzed by the Texas appellate courts which have relied on it, and the Texas Supreme Court has not adopted this rule expressly. [2] "To determine state substantive law, we look to final decisions of the state's highest court." *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 993 (5th Cir. 1999) (*citing Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992)). "'When there is no ruling by the state's highest court, it is the duty of the federal court to determine as best it can, what the highest court of the state would decide.'" *See id.* (quoting *Transcontinental*, 953 F.2d at 988). Thus, we must make a guess as to how the Texas Supreme Court would interpret this rule. Because the Texas Supreme Court has chosen to follow modern choice of analysis, we proceed with that background assumption. As such, there are two aspects to this rule that must be discussed before it can be applied.

The first aspect is the rule's tacit assumption that foreign law is relevant to the contract in question. For example, there is no reason to suspect Texas courts would deem void a con-

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[2] "Writ refused, n.r.e." is not the same as "writ refused," in the writ history of Texas appellate cases. Only an unqualified "writ refused" must be treated as on equal footing with other Texas Supreme Court precedent. See Texas Jurisprudence, 3d § 145.

tract between Texans for the sale of cheese in Texas, even if Mexican law purported to make all sales of cheese illegal, even those occurring in Texas. Mexican law would be inapplicable to the contract in question because Mexico has no legitimate interest in the contract. The second aspect to consider is the meaning of "with a view." First, we discuss the rule's assumption that foreign law is relevant.

Historically, the assumption that the laws of a foreign country were relevant or applicable to a contract was justified if the contract was to be performed in the other country because place of performance or place of contract decided the choice of law question. *See* 6 WILLISTON ON CONTRACTS § 1749 (1938). Moreover, "good morals and the obligations of international comity demand denial of judicial sanction to the intentional breach of ... the general laws of a friendly state." *Id.* Under modern choice of law analysis, however, place of performance or place of contract formation is not always determinative. Furthermore, principles of comity only extend so far. *See Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir. 1994) (noting that comity "must yield to domestic policy" and "cannot compel a domestic court to uphold foreign interests at the expense of the public policies of the forum state").

As stated, modern choice of law analysis in Texas applies the law of the forum with the "most significant relationship" to the contract in question. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984). Thus, a contract legal in the U.S. may be illegal in Mexico, yet under choice of law analysis, Mexican law might not be chosen to apply. If Mexican law does not apply to determine validity, then to say the contract is illegal in Texas because it violates Mexican law reverts too quickly back to a discarded conclusion, a conclusion rooted in the traditional assumption that Mexican law always has an interest in the contract if some aspect of the contract is illegal under Mexican law.

There are at least two reasons to defer to foreign law, however, even if that law would not be chosen to govern the contract. First, a contract legal in the U.S. and illegal in Mexico may places parties in a dilemma. They can either perform the contract and face Mexican liability (Mexico, after all, may have personal jurisdiction over the parties). On the other hand, the parties can breach the contract, but then face U.S. liability for contract damages. This dilemma, however, is not implicated in tortious interference claims, because by definition, the defendant is not a party to the original contract and thus need not choose between breaking foreign law or facing U.S. liability. A dilemma only exists to the third party if foreign law gives the third party a duty or right to interfere. No duty is alleged in this case with respect to MCI and SBC and the right to interfere (privilege) is addressed below.

A second, but more important, reason to defer to foreign law even if it does not apply to the contract is the mentioned principle of comity, which suggests that the U.S. should respect Mexican law on a kind of "golden rule" basis. The leading Texas case demonstrates this situation although without this explicit reasoning. *See Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629 (Tex. App.—San Antonio, 1993). In *Purina*, a contract to export goods into Mexico was found illegal in Texas because the parties were smugglers who did not have the necessary Mexican licenses. *Id.* at 639. Even if Texas law applied to that contract under a most significant relationship test, the principle of comity would be a strong basis to hold the Texas contract illegal under Texas law, and thus not a basis for a tortious interference claim. If there is no dilemma and there is no basis for comity, however, the old rule makes no sense under modern choice of law analysis which already takes into account the interests of the various fora. To allow foreign law to jump back in and change the conclusion circumvents the principles behind the original choice of law.

The second aspect of the rule that must be analyzed is what "with a view" means. The language implies the existence of an intention on the part of at least one of the parties to violate foreign law. It is unclear whether the rule requires both parties to have illegal intentions, as it has been remarked that one party's mere knowledge of the other's illegal intentions is insufficient to void a contract. *See International Aircraft Sales, Inc. v. Betancourt*, 582 S.W.2d 632, 635 (Tex. Civ. App. - Corpus Christi May 31, 1979, writ refused n.r.e.). If intention did not matter, the rule could merely state that contracts which violate foreign law are illegal. The policy behind this part of the rule appears to be that it is against the public policy of the domestic forum to encourage willful attempts to break foreign law. Given these considerations, however, it makes no sense to apply the rule if there is no intention of either party to violate foreign law. More importantly, however, if foreign law is sufficiently unclear as to the legality of certain actions, then it is unreasonable to say the parties entered the contract with a view to violate anything.

Because the Texas Supreme Court has not addressed these issues, we consider how the court might decide the first issue, and we decide that when a contract governed by *Texas* law violates the laws of a foreign country, that violation does not void the contract for purposes of tortious interference claims if the foreign policies at issue do not demand comity. In this case, if Mexican law banned the import of U.S. switching services or the incidental resale of Mexican capacity by a non-provider, it would be a policy designed to increase the monopoly power of a domestic company outside the territorial boundaries of that country. Such policies do not demand comity. It would not be the case of a country banning an import which is arguably injurious to the health or morals of its citizens, such as toxic waste or pornography. Instead, if ATI's activities were illegal in Mexico, then it would be an example of a country banning the import of a competitive service for which no legitimate monopoly exists. While it is fine for a

country to take a protectionist position, the legality of U.S. contracts need not turn on it.

Because there is no "dilemma" alleged in the current case with respect to third parties being forced to choose between U.S. contract damages and Mexican liability, we do not decide the effect of such a dilemma on the rule.

Thus, even if Mexican law prohibited the resale of already resold telecommunications services or prohibited the importing of U.S. telecommunications services, these facts do not serve as a defense to a claim of tortious interference with such contracts in situations when the alleged tortfeasor is not forced to choose between violating foreign law or suffering U.S. liability, when Texas law otherwise governs the underlying contracts and torts.[3]

An alternative basis to decide this issue, of course, would be that contracts entered "with a view" to violate foreign law are not void for the purposes of tortious interference claim if neither party to the contract had illegal intentions. An illegal intention is not shown in this case, at least for the purposes of summary judgment. As shown below, Mexican law at the time was sufficiently unclear and capable of multiple interpretations as to what was or was not legal. Such difficulty in interpreting foreign law makes it unreasonable to conclude any contract was entered with a view to violate foreign law. The fact that ATI attempted to get a permit "just in case," does not prevent them from successfully arguing that their service was legal and they believed it was legal. While the content of foreign law is a legal question, the question of

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[3] For the purposes of this analysis, it is assumed that the SCT's refusal of a permit to ATI suffices to show exclusion from the Mexican market. This assumption is made without deciding that such a refusal shows a permit was legally required, but only that one was not readily available. Had one been easily available and a mere "formality," then it would not make sense to characterize Mexican law as protectionist.

ATI's intention is not, and there is sufficient evidence to permit a jury to conclude ATI was acting with the view that their services were legal; as such, summary judgment against ATI on the tortious interference claims would be improper unless ATI's activities were illegal under U.S. law or subject to another defense, as discussed below.

2. Validity Under U.S. Law

It remains to determine whether ATI's contracts and services were illegal with respect to U.S. law. The defendants assert that ATI's activities were contrary to 47 U.S.C. § 214, which requires authorization before a carrier "shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line." ATI, however, merely provided a service that connected different lines and did not itself construct any new lines. Section 214 applies only to the construction of facilities and does not prevent carriers from offering new services. *See MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977).

Furthermore, even with respect to call-back, a practice truly hostile to a legitimate domestic monopoly, the FCC decided in 1995 that even call-back did not violate U.S. or international telecommunications law and only prohibited the service on comity grounds where "expressly prohibited" in the foreign country. *In re VIA USA, Ltd.*, 10 FCC Rcd. 9540 ¶¶ 50-51 (1995). Thus, during 1993 and 1994, there was no basis to deem call-back, let alone reorigination, illegal under U.S. law.

3. Other Tortious Interference Defenses

The defendants also support the entry of summary judgment in their favor on a number of alternative legal grounds,

including federal preemption, the terms of MCI's tariff, Texas tortious interference doctrine, and privilege.

(a) Privilege

First, the defendants assert that they are protected by the common law defense of privilege. The Texas Supreme Court has explained this defense thus:

> Under the defense of legal justification or excuse, one is privileged to interfere with another's contractual relations (1) if it is done in a bona fide exercise of his own rights, or (2) if he has an equal or superior right in the subject matter to that of the other party. One may be privileged to assert a claim even though that claim may be doubtful, so long as it asserted a colorable legal right. However, the defense of legal justification or excuse only protects good faith assertions of legal rights.

Victoria Bank & Trust v. Brady, 811 S.W.2d 931, 939-40 (Tex. 1991).

The Restatement, cited as authority in Victoria Bank, explains that the defense "protects the actor only when (1) he has a legally protected interest, and (2) in good faith asserts or threatens to protect it, and (3) the threat is to protect it by appropriate means." Restatement (Second) of Torts § 773.

MCI did have a legal right to halt MCI's service with ATI if Telmex threatened to cut off MCI's service. That right was based on the MCI's contract with ATI. But ATI's tortious interference claim is not based on MCI halting ATI's service; it is based on MCI giving away ATI's confidential information. As such, ATI's claims concern actions which cannot be traced to legal rights stemming from a contract or domestic or foreign law. If MCI "disclose[d] the business or application(s) of [its] customers," it was in violation of U.S. law, according

to MCI's correspondence with Telmex. [4] MCI maintains that it was trying to protect its interest in its contract with Telmex, and to ensure that AT&T was not receiving illegal preferential treatment from Telmex. The problem with MCI's argument is that the tortious interference was allegedly accomplished through improper release of confidential information. Release of nonconfidential information may be a basis for privilege. *See* Restatement (Second) of Torts § 773 illus. 1. The release of confidential information, however, is not an "appropriate means" to protect other interests.

If *Telmex* cut off ATI's service as alleged, it might have been against Mexican law, but whether or not it was, Telmex's privilege is not before us, except insofar as SBC attempts to claim it by virtue of SBC's part ownership of Telmex. SBC maintains that it was protecting the interests of its affiliated company Telmex. However, SBC is only a 10% owner of Telmex and there is evidence which a factfinder could find that SBC's actions in helping Telmex and MCI shut down ATI were as much for SBC's benefit as its own entity rather than as an agent of Telmex, given that SBC intended to independently enter ATI's market. Because there is not a completely obvious "unity of interest" between SBC and Telmex, summary judgment on SBC's privilege defense is inappropriate. Thus, there is no basis on which to rest a defense of privilege for SBC and MCI at the summary judgment stage.

(b) Preemption

MCI argues that its filed tariff preempts ATI's Texas tort claims because of the federal "filed-rate doctrine." Many cases speak about federal preemption of state claims when there are filed tariffs. *See, e.g., Marcus v. AT&T Corp.*, 938 F. Supp. 1158 (S.D.N.Y. Aug. 21, 1996), *aff'd*, 138 F.3d 46

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[4] Neither side cites the regulation that such disclosure violates; however, no party disputes that such disclosure is illegal without permission.

(2d Cir. 1998) (holding the following claims preempted: deceptive acts and practices, false advertising, fraud and deceit, negligent misrepresentation, breach of warranty, and unjust enrichment by failing to disclose that customers were billed per minute rounded up to the next higher full minute for long distance services). The leading and controlling case in this area for our purposes is *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998), in which the Supreme Court expounded on the filed-rate doctrine.

Central Telephone, a bulk reseller of long distance services purchased from AT&T, sued AT&T, alleging breach-of-contract and tortious interference claims. Under the filed-rate doctrine, federal law preempts claims concerning the price at which service is to be offered, and the Supreme Court ruled that it also preempts claims concerning the services that are offered. *See id.* 118 S. Ct. at 1962-64. The Court thus found the breach-of-contract claims preempted. The Court also found the tortious interference claim preempted, but only because that claim was "wholly derivative of the contract claim for additional and better services." *Id.* at 1964. The tortious interference claim alleged that AT&T's refusal to provide certain types of service led to interference of Central Telephone's contracts with its customers. *See id.* at 1964-65. It was thus not protected by the saving clause of the Communications Act. *See id.* at 1965 ("A claim for services that constitute unlawful preferences or that directly conflict with the tariff—the basis for both the tort and contract claims here—cannot be 'saved' under § 414.").

ATI's tortious interference claims are different. It does not allege that MCI stopped providing service, resulting in ATI being unable to meet customer demand. Rather, ATI alleges that MCI released confidential information, first to Telmex and then to AT&T. This information ultimately led those parties to deny service to ATI. This claim is not derivative of a

contract claim. It does not concern the provision of services which are covered by the filed tariff, but rather it concerns illegal actions outside the scope of the tariff and not derivative of any phone services. Therefore, the filed rate doctrine does not preempt ATI's tortious interference claims.

(c) Filed Tariff

MCI argues that its filed tariff precludes liability because there is a contractual provision stating that MCI may halt service if a situation arose involving threats from the third party partner. This only goes to whether MCI breached its contract with ATI, not whether MCI breached duties imposed outside of the contract, as alleged by ATI, and thus this argument fails as a defense to tortious interference. The right to halt one contract does not grant the right to interfere with another by any conceivable means. MCI may well have been entitled to cut off service to ATI once Telmex threatened it with cutting off international 800 service. But the provision did not authorize MCI to respond to such threats by helping Telmex cut off ATI, or by preventing ATI from having a contractual relationship with AT&T.

(d) Breach of Contract

MCI argues that ATI's tortious interference claims are nothing more than claims that MCI breached its contract with ATI, and as such are precluded from serving as the basis of tortious interference claims. Under Texas law, "the general law is that where a defendant's conduct breaches an agreement between the parties and does not breach an affirmative duty imposed outside the contract, the plaintiff ordinarily may not recover on a tort claim if the damages are economic losses to the subject matter of the contract." *National Union Fire Ins. Co. v. Care Flight Air Ambulance Serv., Inc.*, 18 F.3d 323, 327 (5th Cir. 1994). However, this does not mean tort damages cannot be measured by economic losses from

the contract. *See American National Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*, 798 S.W.2d 274 (Tex. 1990) (allowing recovery for exemplary damages for tortious interference claim when damages from the tort were the same as economic damages from breach of contract). Furthermore, it is obvious that ATI's claims are not breach of contract claims, but rather are allegations that MCI breached duties imposed affirmatively outside the context of the ATI-MCI contracts. Thus, this defense fails as well.

(e) No Issue of Material Fact

Finally, MCI argues that there is no evidence that MCI actually gave ATI's numbers to Telmex. There is at least a material issue as to this fact, however, and summary judgment is inappropriate. The fact that MCI and MCI's employees say they did not give away the numbers flies square in the face of the memoranda and communications discovered by ATI which suggest that MCI planned to and did do just that.

C. Federal and State Antitrust Claims

1. Prima Facie Showing

The district court dismissed ATI's federal and state antitrust claims because the court failed to find a relevant U.S. market. In order to support an antitrust claim, there must be actions which have a reasonably foreseeable effect in a defined U.S. market. *See* 15 U.S.C. § 6a; *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993) (allowing Sherman act recovery for foreign conduct that produces "some substantial effect in the United States").

ATI asserts that there was a direct and substantial effect on trade or commerce, and second that it was engaged in export trade. The substantial effect that ATI identifies is that its own business, as well as that of other companies, failed, "resulting in an inability to sell its U.S. telephone switching services to

all Mexican customers." The alleged actions by Telmex and the other defendants were aimed at shutting down this market. It is clear that the U.S. export market for reorigination services was a definite and sizable export market, and the failure of these 80 businesses is clearly an effect on export trade from the United States. The market is significant, with ATI's annual revenues alone reaching $3 million/year at the time the events occurred. Under 15 U.S.C. § 6a, the antitrust laws do "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless ... such conduct has a direct, substantial, and reasonably foreseeable effect ... on trade or commerce which is not trade or commerce with foreign nations, or on import trade or ... export trade ... with foreign nations." By showing a significant effect on a U.S. export market, ATI meets the export trade exception.[5]

For the purposes of the antitrust inquiry, however, it matters whether the importation of these U.S. services was legal under Mexican law. If the importation of these services was illegal, there is no legal export market to Mexico. If there is no legal U.S. export market to Mexico and the only U.S. export market affected is the Mexican market, then there is no antitrust injury. *Cf. Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies."). In other words, foreign countries may make laws or create monopolies

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[5] This is not to say that the factfinder could not ultimately conclude that the relevant market for antitrust liability is the Mexican long-distance market. Our characterization of Telmex's business and our determination that the actions of Telmex and the other defendants had a "direct, substantial, and reasonably foreseeable effect" on the U.S. export market for switching services does not preclude the factfinder from making an independent determination of the relevant market for the purposes of antitrust liability. *Cf. Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 311 (5th Cir. 1997).

that effectively and completely exclude U.S. import competition. That does not then mean that U.S. companies can enter the market anyway and make antitrust claims when things do not work out. Even in the U.S., the existence of a legitimate government granted monopoly precludes claims of antitrust violation when a plaintiff wants to compete in the regulated market. *See Alameda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343 (5th Cir. 1980).

This is not inconsistent with our holding that contracts for reorigination services may still serve as the basis for tortious interference claims. For the purposes of antitrust law, the threshold choice of law determination always validates a foreign government's right to determine whether outsiders can compete. As we have held, however, this choice of law is not mandated by the law of tortious interference. Admittedly, this is a "conflict" within U.S. law, but not one we need to resolve.

ATI challenges the district court's award of summary judgment against it on its antitrust claims against SBC and MCI. Because we find that ATI's services were legal under the law of Mexico at the relevant time, anticompetitive means of stopping such service may violate U.S. antitrust laws.

2. Legality of ATI's Operations Under Mexican Law

The content of foreign law is a question of law and is subject to de novo review. *See* Fed. R. Civ. P. 44.1; *Perez & Compania v. M/V Mexico I*, 826 F.2d 1449 (5th Cir. 1997). "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43." Fed. R. Civ. P. 44.1. Under this rule, expert testimony accompanied by extracts from foreign legal material is the basic method by which foreign law is determined. *Republic of Turkey v. OKS Partners*, 146 F.R.D. 24, 27 (D. Mass. 1993). It is not, however, "an invariable necessity in establishing foreign

law, and indeed, federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities." *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1275, 1285 (S.D.N.Y.), *aff'd mem.*, 622 F.2d 203 (2d Cir. 1980). Likewise, differences of opinion among experts on the content, applicability, or interpretation of foreign law do not create a genuine issue as to any material fact under Rule 56. *Banco de Creditor Indus., S.A. v. Tesorreria General*, 990 F.2d 827, 838 (5th Cir. 1993). In general, summary judgment is appropriate to determine the content of foreign law. See 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE CIV.2D § 2444.

At issue is the legality of ATI's business under Mexico law. Under Mexican law at the time in question, a government concession or permit was required in order to provide telecommunications services in Mexico. It is undisputed that ATI had no permit or concession from the Mexican government. What is disputed is whether ATI's business was within the scope of this law. ATI makes the argument that at the time in question, the relevant regulatory provisions envisioned the concession requirement to only apply to entities who were providers of telecommunications services in that they owned, installed, operated, and exploited telecommunications infrastructure in Mexico, with emphasis on the "and." The defendants argue that a permit is required to install, operate, "or" exploit telecommunications infrastructure in Mexico, with emphasis on the "or," and because ATI exploited the infrastructure, they needed a permit. The defendants also argue that all "resellers" needed permits.

ATI rests primarily on the deposition of Miguel Orrico Alarcon, who was head of SCT legal counsel for 33 years. Orrico, who is said to have drafted, applied, interpreted and enforced the provisions at issue, explained that Mexico's statutory definitions of a "provider" of telecommunications

service is limited to those that install, operate, and exploit the network. Because ATI did not install a network, and because special significance is attached to the conjunctive language of the statute, ATI was not a provider and therefore was not regulated under these provisions. Mexican law changed subsequent to the time at issue in this case, and now resellers explicitly are required to obtain permits.

The defendants focus on Moncayo's letter and on the Secretary of Communications and Transportation's Official Circular Letter 119-1900. Moncayo's letter is of little value, because it directly discusses only "call-back" services, which ATI's was not. The Official Circular, however, condemns such services in addition to "other similar or equivalent procedures with the same purpose." The Circular concludes that such services are "rendered outside the legal provisions established by the Federal Law on Telecommunications, in view of the exclusive nature of the right granted to Telefonos de Mexico until August 1996 for rendering basic national and international long distance service."

The defendants maintain that the Official Circular is entitled to deference by this court as an agency's interpretation of the laws which it administers and enforces, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). ATI counters that the official circulars in fact have no legal effect, and that in Mexico, only federal courts have the power to issue resolutions determining the legality or illegality of acts. Moreover, ATI emphasizes, only the General Bureau of Judicial Matters has the sole power to "establish and systematize" the legal criteria concerning the application of legal and regulatory provisions, not Mr. Moncayo's office.

Recognizing the difficulty of interpreting foreign law, courts may defer to foreign government interpretations. The Seventh Circuit reached this conclusion in deferring to an administrative agency in France, a civil law country. *See In*

re Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes deference to the construction France places upon its domestic law.... Giving the conclusions of a sovereign nation less respect than those of [a U.S.] administrative agency is unacceptable.").

In *Amoco Cadiz*, the court was faced with conflicting interpretations of French law. The court noted that had the litigants been private parties, it would have had to resolve the conflicts. *See id.* at 1312. Because the Republic of France was before the court, however, the Seventh Circuit accepted its interpretation of the law. *See id.* The Republic of Mexico is not a litigant before this court and neither is the SCT. And while the evidence shows that the SCT was empowered to enforce Mexican law, it does not persuasively show that the SCT was empowered to interpret Mexican law. The fact that U.S. courts routinely give deference to U.S. agencies empowered to interpret U.S. law and U.S. courts may give deference to foreign governments before the court does not entail that U.S. courts must give deference to all agency determinations made by all foreign agencies not before the court. More importantly, the most relevant official circular at issue is dated 1996, after the new laws went into effect; thus, it is unclear whether the SCT position was that such activities were currently illegal or had always been illegal. For these reasons, we do not feel compelled to credit the SCT's determinations without analysis.

The defendants also argue that the relevant regulations required a permit to be a reseller. The statute in question, however is not without question. Our English translation of Article 75 of the Telecommunications Rulings of Mexico reads as follows:

> The exploitation of the telecommunications network given in concession must be carried out directly by its holder and its commercialization may be made through

> agents in accordance with the provisions approved by the Ministry.

We read this to mean that the direct operation of the network must be accomplished by the actual provider, and that the provider may designate others to commercialize the network. It does not say commercialization "must" be made through those channels, however. Furthermore, this court has not been apprised of the content of any "Ministry provisions," and the defendants have not identified any regulation in place at the time which defines or regulates "resale" or explicitly requires a permit for anything except provision, which we have already decided ATI was not doing. Instead, we find convincing the argument that before the new laws took effect, only the direct provision of telecommunications services required a concession from the Mexican government, for several reasons.

First, because ATI's method was novel, it is unrealistic to read the older Mexican law as covering the service. The new laws explicitly regulate resale and pointedly are not retroactive; this is at least some evidence supporting the notion that permits were not previously envisioned.

Second, Mexico's concession to Telmex specifically authorized Telmex to resell any excess capacity, even before 1996, although it did not require it to do so. Thus, what appears to be the case is that Telmex resold capacity to MCI not realizing the boon it would be for others to use that capacity with additional U.S. services attached.

Third, a conclusion that any Mexican resale is covered by the older, vague provisions would entail that every U.S. or Mexican business with a toll free number would have been required to have a permit because they "resell" Mexican phone service as much as ATI did whenever they charge the cost of call-back to the caller through their service fees. The fact that laws could try to distinguish between resellers "pri-

marily" engaged in resale versus those "incidentally" engaged in resale does not change the fact that the relevant laws are not so explicit.

Fourth, to say that any Mexican resale required a permit would have invalidated MCI's contracts with Telmex insofar as neither MCI nor Telmex has indicated that MCI had a permit. While it is not necessary for either defendant to show its own conformity with Mexican law, it adds skepticism to their argument that a permit was required or even envisioned and lends credibility to the view that what happened in this case is that Telmex made a bad bargain with MCI and wanted to get out of it. Telmex's contract with MCI might have purported to restrict MCI's subsequent use of the lines, but ostensibly did not. Our view is further supported by the fact that the SCT did nothing to instigate enforcement proceedings against any business during the relevant time period. The evidence indicates that by law the SCT was required to institute such enforcement if there was evidence of illegality. Instead, the precatory language of even the 1993 SCT letters, stating that the SCT would be "grateful" if MCI suspended the service of its customers, suggests that even to the SCT the services in question were not clearly illegal.

Fifth, because Telmex has no legitimate interest in tying a monopoly over domestic lines to the use of lines outside of Mexico, we will not construe Mexican law as requiring a permit for the importing of U.S. switching service unless explicitly authorized. No one contends that the relevant laws are this explicit, however. Furthermore, this interpretation conforms with the FCC's extension of comity to foreign law when foreign law is unambiguous.

For all of these reasons, we find ATI's activity in Mexico to be legal during the time in question. Thus it was improper to dismiss ATI's state and federal antitrust claims against SBC and MCI. It is argued that this application of the export exception circumvents the principle that antitrust laws do not

extend to other nations' competitive rules. *See Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 582, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). This would only be true if the legality of the export-import business were not taken into consideration, which it has been. The fact that we find ATI's business to be legal in Mexico is not irreconcilable with Mexican policy designed to protect Telmex from domestic competition, since such a policy is not furthered by banning the import of U.S. reorigination services. Furthermore, Mexican law could have explicitly protected Telmex from even international competition by making it illegal to import U.S. services, which would have been a basis to defeat these antitrust claims.

D. Personal Jurisdiction over Telmex

A federal district court has personal jurisdiction over a nonresident defendant to the same extent as a state court in the state in which the district court is located. *See, e.g., Bullion v. Gillespie*, 895 F.2d 213, 215 (5th Cir. 1990). The Texas long-arm statute extends to the limits of the Due Process Clause of the Constitution. *See* Tex. Civ. Prac. & Rem. Code Ann. § 17.042. The exercise of personal jurisdiction thus can be maintained if the nonresident defendant has purposefully availed itself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state, *see, e.g., International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945), and if the exercise of jurisdiction over the nonresident defendant does not offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

Telmex claims both that it did not have sufficient contacts with the forum state, and that the exercise of jurisdiction over it would be improper because the procedural and substantive policies of Mexico would be affected. Asahi noted that "[g]reat care and reserve should be exercised when extending

our notions of personal jurisdiction into the international field." *Id.* at 115, 107 S. Ct. 1026 (internal quotation marks omitted). *Asahi*, however, was concerned with "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system." *Id.* at 114, 107 S. Ct. 1026. For Telmex, a company that indisputably has engaged in numerous business dealings in the United States, these concerns are de minimis, and even if Mexican policy is relevant on the merits, it is not relevant to the initial determination of personal jurisdiction. If Telmex has broken U.S. law, then requiring Telmex to answer for that would be "fair play."

Thus, there was no personal jurisdiction over Telmex only if Telmex did not have sufficient contacts with Texas and the United States. Minimum contacts can be established either through contacts giving rise to general jurisdiction, or those giving rise to specific jurisdiction. We shall consider these as well as ATI's alternative claim that jurisdiction is authorized under a special provision of the Clayton Act.

1. General Jurisdiction

The lower court dismissed the claims against Telmex on personal jurisdiction without an evidentiary hearing. In such instances, the plaintiff satisfies his burden by presenting a prima facie showing of jurisdiction. *See Felch v. Transportes Lar-Mex, S.A. de C.V.*, 92 F.3d 320, 326 (5th Cir. 1996). Conflicting evidence must be resolved in favor of the plaintiff. *See id.* (quoting *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 1990)).

General jurisdiction can be assessed by evaluating contacts of the defendant with the forum over a reasonable number of years, up to the date the suit was filed. *See Metropolitan Life Insurance Co. v. Robertson-CECO Corp.*, 84 F.3d 560, 569 (2d Cir. 1996). Telmex's contacts with Texas over the time period from 1990 to 1996 were numerous; the major ones are highlighted here. Up until 1990, Telmex leased telephone

circuits between Arizona and Texas. Telmex's current lines interconnect with Texas at the border in McAllen and El Paso. Telmex leased real property in Texas in 1995 and paid taxes to Texas that same year. Telmex contracted to warehouse 75,000 telephone poles in Laredo around 1990-1991. Telmex had correspondent agreements with a number of U.S. carriers. Settlement revenues from these agreements totaled approximately $1 billion a year in 1994-1995. The total revenues derived from Texas residents totaled millions of dollars a month. Telmex also solicited ads for yellow page ads in border cities of U.S., although it is unclear exactly where. Additionally, SBC is alleged to be a Texas contact of Telmex, since SBC owns a portion of a controlling interest in Telmex and thus exerts some control over Telmex.[6]

The district court examined each Telmex contact and in isolation from the others, rather than examining the contacts "in toto" as required. *See Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 779 (5th Cir. 1986). In other words, even if a number of different contacts are independent of one another, if they occur with such frequency that the contacts in general are "continuous and systematic," there is general jurisdiction.

The question, then, is whether Telmex's contacts with Texas demonstrate a business presence in Texas sufficient to confer general jurisdiction. The mere renting or ownership of property in a forum is not enough when that property is not used to conduct business in the forum. *Cf. Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977). And while Telmex's other contacts may be continuous and system-

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[6] A number of other contacts are also put forward, mostly involving Telmex paying for services that were provided by corporations in Texas or the U.S. Such services included consulting and finance services. To the degree these contacts involve Texas, they add little to the issue; to the degree they are with other states, they are irrelevant at this juncture. Other contacts, such as Telmex being listed on the NYSE, or designating a N.Y. agent for service of process are also not very informative.

atic contacts which constitute doing business with Texas. Telmex has virtually no contacts which constitute doing business in Texas. Primarily, Telmex interconnects its Mexican lines with American lines, enabling long distance communication. The money U.S. companies pay Telmex is for service on the Mexican leg of the call; the money the U.S. carriers receive is for the U.S. leg of a call. As such, Mexican and U.S. telecommunications companies do business with each other in these situations, but neither is doing business in the other country for jurisdictional purposes.

The lines Telmex leased from Texas to Arizona also were for the purpose of connecting two points in Mexico and do not constitute doing business in Texas. The fact that SBC owns a portion of a controlling interest in Telmex also adds little to the mix. SBC's 10% interest is not a controlling interest, and typically, the corporate independence of companies defeats the assertion of jurisdiction over one by using contacts with the other. *See Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983) ("Generally, our cases demand proof of control by the parent over the internal business operations and affairs of the subsidiary in order to fuse the two for jurisdictional purposes.").

The one contact that could constitute doing business in Texas would be the yellow page ads. However, the evidence on the yellow page ads consists of nothing more than a comment that Telmex solicited yellow page ads in border cities in the U.S. without naming which cities, when this occurred, whether such ads actually were actually placed, or for how long. Without more, such evidence does not help establish continuous and systematic contacts.

It is alleged that MCI sells regular phone service, international 800 service, and private line service for Telmex in Texas. This would imply a principal/agent relationship from which jurisdiction might arise. There is no evidence, however, that the provision of service by MCI was on behalf of

Telmex but instead it appears to be in the nature of the resale of capacity in Mexico by MCI and the independent provision of capacity in the U.S. by MCI, as explained above with respect to the general interconnection agreements.

The strongest argument for general jurisdiction is that Telmex had arrangements with American carriers to accept telephone signals from Texas, and in order to serve this purpose, Telmex's telecommunications lines crossed into Texas, terminating across the border. The termination of Telmex's telephone lines in Texas allows for continuous and systematic transfer of calls. However, despite the apparent force of the argument that such a contact demonstrates a presence in Texas for business purposes, we are bound by *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 491 (5th Cir. 1989), in which such interconnections, even though crossing the border into a forum, were held insufficient to confer general jurisdiction under the Due Process Clause.

In sum, the totality of the contacts suggests that Telmex conducted a great deal of business with Texas, but virtually none in Texas, as such general jurisdiction cannot be shown, even on a prima facie basis.

2. Clayton Act Jurisdiction

Because we find that ATI has shown potential U.S. antitrust injury, jurisdiction over Telmex may be obtainable based on nationwide contacts rather than just Texas contacts under the jurisdictional provision of the Clayton Act, 15 U.S.C. § 22. This provision allows for jurisdiction over any federal antitrust suit in any district in which a defendant transacts business, and provides that "all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." When jurisdiction is invoked under the Clayton Act, the court examines the defendant's contacts with the United States as a whole to determine whether the requirements of due process have been met. *See*

Go-Video, Inc. v. Akai Electric Co., Ltd., 885 F.2d 1406 (9th Cir. 1989).

However, while there may be some additional evidence of Telmex doing business *with* the U.S., there is no evidence qualitatively difference on the subject of doing business in the U.S. for what we deem to be a relevant time period from 1990 to 1996. Thus, Clayton Act personal jurisdiction over the antitrust claims is also unavailable.

3. Specific Jurisdiction

ATI maintains that specific jurisdiction over Telmex arises because Telmex "purposefully directed its activities to residents of Texas (ATI and over 80 other resellers)." As ATI recognizes, specific jurisdiction over a nonresident exists when the defendant "purposefully avails" itself of the privilege of conducting activities in the forum, and the plaintiff's cause of action arises out of or relates to that act. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). By working through SBC and MCI to obtain the numbers of resellers, ATI maintains, Telmex purposefully availed itself of the forum.

While Telmex did not conduct much business in Texas, it conducted a high volume of business with Texas and Texas corporations. It was this business with which Telmex was concerned when Telmex allegedly canceled ATI's numbers. Such actions, if done without a legal right, may amount to violation of U.S. law. The issue of whether they were legally privileged, however, is not before us, and such a defense would not defeat personal jurisdiction. Thus, if the allegations against Telmex are true, then Telmex may have violated U.S. antitrust law by harming a Texas business through the willful cancellation of a necessary portion of that business's service. Such actions would have reasonably foreseeable consequences in Texas.

It is no use to say that ATI's location in Texas was "fortuitous." ATI had to be located somewhere and Telmex knew where that was and directed its actions toward Texas by canceling phone service linked to Texas. Telmex's lines ran right up and into Texas for the express purpose of serving Texas residents with Mexican phone service, a service which it received millions of dollars a month in revenue. The allegation that Telmex shut down these lines in order to harm a Texas business whose services were legal in Mexico suffices to confer personal jurisdiction over Telmex for the injuries suffered in Texas. The equivalent result would hold if an electric company sent an electric spike through its lines, damaging computers on the other end, even if that company's lines did not carry the spike all of the way to its destination.

By conducting a large volume of business with Texas through contracts carefully drafted to avoid subjecting Telmex to general personal jurisdiction in Texas, Telmex may have avoided doing business in Texas, but it made sufficient contacts with Texas and received sufficient benefits that personal jurisdiction in Texas is proper to answer for the consequences of the actions it allegedly took, directed toward Texas, to protect its business with Texas.

E. Discovery

ATI complains discovery was improperly limited. The district court stayed discovery on everything except jurisdictional issues and never lifted the stay. ATI contends that it was reversible error for the district court to grant summary judgment for SBC and MCI on all of ATI's causes of action without allowing discovery on substantive issues.

ATI points to SBC's assertion of the *Copperweld* doctrine, which requires a factual determination as to whether a monopolistic conspiracy occurred between economic competitors. This doctrine was asserted for the first time in SBC's motion for summary judgment. ATI complains that it was

unable to investigate the relationship between SBC and Telmex for the purpose of this doctrine. ATI also complains it was unable to investigate the anticompetitive effect in the United States of the defendants' conduct. In particular, ATI points to the fact that the district court ruled against ATI on the issue of relevant market, without affording ATI the opportunity to pursue the issue through discovery. The issue of relevant market is a fact question. *See, e.g., C. E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241 (5th Cir. 1985); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480 (5th Cir. 1984).

ATI has waived the issue of inadequate discovery with respect to SBC. Under Federal Rule of Civil Procedure 56(f), the appropriate way to raise the issue is for the party opposing the motion for summary judgment to file a motion for a continuance with an attached affidavit stating why the party cannot present by affidavit facts essential to justify the party's opposition. ATI did not do this with respect to SBC.

MCI made such a motion, but the district court denied it. To obtain a continuance of a motion for summary judgment, a party must "specifically explain both why it is currently unable to present evidence creating a genuine issue of fact and how a continuance would enable the party to present such evidence." *Liquid Drill, Inc. v. U.S. Turnkey Exploration, Inc.*, 48 F.3d 927, 930 (5th Cir. 1995). The non-moving party may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts in opposition to summary judgment. *See Daboub v. Gibbons*, 42 F.3d 285, 288 (5th Cir. 1995). If it appears that further discovery will not provide evidence creating a genuine issue of material fact, the district court may grant summary judgment. *See Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 278 (5th Cir. 1991).

ATI failed to specify its intended discovery or how such discovery would assist it in opposing summary judgment in favor of MCI. ATI failed to identify who could provide information relevant to the issues other than witnesses who had already been deposed one or more times before.

When a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). ATI, however, has not persuasively indicated that it was deprived of any relevant information with respect to MCI. *Cf. RTC v. Marshall*, 939 F.2d 274, 278 (5th Cir. 1991) (requiring the nonmovant to show how additional discovery would lead to unresolved issues of fact). For these reasons, it was proper for the district court to deny additional discovery.

IV.

For the forgoing reasons, we REVERSE the district court's grant of summary judgment to MCI and SBC on the substantive issues in this case, we REVERSE the dismissal of Telmex on personal jurisdiction, and we REVERSE the denial of partial summary judgment to ATI on the issue of the lawfulness of its activities in Mexico. We REMAND this case to the district court for additional proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

[Filed Feb. 15, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50881

ACCESS TELECOM, INC.,
Plaintiff-Appellant,

v.

MCI TELECOMMUNICATIONS CORPORATION; MCI INTERNATIONAL, INC; SBC COMMUNICATIONS, INC; SBC INTERNATIONAL, INC; SBC INTERNATONAL LATIN AMERICA; TELEFONOS DE MEXICO,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas, San Antonio

ON PETITIONS FOR REHEARING
AND REHEARING EN BANC

(Opinion 12/1/99, 5 Cir., _____, _____ F.3d _____)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and DAVIS, Circuit judges.

PER CURIAM:

(√) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing

En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearings En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter Higginbotham
PETER HIGGINBOTHAM
United States Circuit Judge

Judges Emillo M. Garza, Barksdale, and Jolly did not participate in the consideration of the petition for rehearing en banc.

APPENDIX C

[Filed Aug. 5, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-96-CA-1064

ACCESS TELECOM, INC.,
Plaintiff.

v.

MCI TELECOMMUNICATIONS CORP., MCI INTERNATIONAL INC., SBC COMMUNICATIONS INC., SBC INTERNATIONAL, INC., and SBC INTERNATIONAL LATIN AMERICA,
Defendants.

JUDGMENT

In its hereby ORDERED, ADJUDGED and DECREED that Plaintiff, Access Telecom, Inc., take nothing on its claims against the Defendants, MCI Telecommunications Corp., MCI International, Inc., SBC Communications, Inc., SBC International, Inc., and SBC International Latin America, Inc., and that judgment be entered in favor of the Defendants MCI Telecommunications Corp., MCI International, Inc., SBC Communications, Inc., SBC International, Inc., and SBC International Latin America, Inc., Each party shall bear its own attorney's fees and costs.

SIGNED this the 5th day of August, 1998.

/s/ D.W. Suttle
D.W. SUTTLE
Senior United States District Judge

APPENDIX D

[Filed Aug 5 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-96-CA-1064

ACCESS TELECOM, INC.,

Plaintiff,

v.

MCI TELECOMMUNICATIONS INC., *et al.*,

Defendants.

ORDER

The matter before the Court is the Motion for Summary Judgment filed by defendants SBC International, Inc., SBC Communications, Inc., SBC International, Inc., and SBC International Latin America, Inc. (hereinafter referred to collectively as "SBC") on September 4, 1997,[1] the response filed by Access Telecom, Inc. ("ATI") on September 26, 1997,[2] SBC's Reply filed on October 17, 1997,[3] and the Advisory to the Court filed by ATI on December 12, 1997.[4] Having reviewed these documents, the supporting exhibits and affidavits attached thereto, and the relevant case law, the Court enters the following order.

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[1] Docket Entry No. 115.

[2] Docket Entry No. 138. Attached thereto is ATI's Appendix to its response (Docket Entry No. 139).

[3] Docket Entry No. 147.

[4] Docket Entry No. 158.

I. FACTUAL BACKGROUND

ATI began operating in June 1993. One of the businesses it engaged in was the reorigination of international long distance calls from its customers in Mexico to parties located in the United States at rates cheaper than the customer would pay if it used the long distance services of Telefonos de Mexico ("Telmex"). SBC is a minority interest holder in Telmex. MCI is a provider of interstate and international telecommunications services to both commercial and residential users. On June 30, 1993, ATI executed a letter of authorization selecting MCI as its long distance carrier and provider of 800 numbers. On July 7, 1993, ATI executed an MCI Global Vision Enrollment Form and Agreement. On November 30, 1993, ATI executed an MCI Global Vision Enrollment Form replacing the July 7, 1993 agreement. The November 30, 1993 enrollment form incorporated by reference the terms and conditions of MCI Tariff FCC No. 1 ("the Tariff"). On August 6, 1994, ATI executed an MCI Vision VIP Enrollment Form and Agreement replacing the November 30, 1993 Agreement. The August 6, 1994 Enrollment Agreement also incorporated by reference the Tariff. MCI International ("MCI") is a participating carrier under the Tariff. Beginning in July 1994, Telmex began terminating ATI's I-800 services, claiming that ATI's I-800 service was in violation of Mexican law.

ATI filed the instant lawsuit against SBC and the other defendants in the 734th Judicial District Court, Bexar County, Texas. ATI alleges the following as to SBC:

> 10. Beginning in early 1994, TELMEX and/or SBC began to seek to interfere in the contractual relationship between MCI and ATI and/or the customers of ATI for the purpose, at least in part, and with the effect of reducing or limiting competition in telephone services within Texas and the United States.

11. During or before 1992, TELMEX entered into an agreement with MCI INTERNATIONAL, INC. to provide international 800 (I-800) service from Mexico to the United States. MCI INTERNATIONAL, INC. provided this service to MCI TELECOMMUNICATIONS CORP. during and since 1992. MCI TELECOMMUNICATIONS CORP. advertised and offered for sale to its customers I-800 service for calls originating from Mexico, based on the services provided by TELMEX.

12. During 1993 and 1994, ATI contracted with MCI TELECOMMUNICATIONS CORP. for I-800 services from Mexico for itself and as agent for various customers. In addition to the I-800 service from Mexico, ATI offered a switching service carried out in Texas and elsewhere in the United States whereby customers could complete calls to a variety of U.S. 800 and other telephone numbers from Mexico. MCI represented to ATI that it had the authority and capacity to contract for telephone services through TELMEX between Mexico and the United States; that the proposed activity by ATI was within the terms of the tariff and in all respects a legal reuse of the services provided; that services would continue under the same legal terms in the future; that the rights and obligations of the parties under contract were enforceable and that MCI would provide the same services in the future with special accommodations to ATI as its business increased. These and other promises and representations induced ATI to enter into an agreement with MCI and were a producing cause of damages to ATI.

13. The services offered by ATI used and paid for the use of TELMEX lines provided to MCI INTERNATIONAL, INC., then to MCI TELECOMMUNICATIONS CORP. which were then sold under contract to ATI. Customers of ATI could save money on

voice and facsimile calls between their Mexican offices and offices in the United States by the use of these services.

14. ATI expanded its business rapidly during 1994 and reached a revenue volume in excess of two million dollars per year. During middle and late 1994, TELMEX and/or SBC began a campaign to eliminate ATI as a source of potential competition, notwithstanding that the 1-800 services offered by ATI were those very same services offered by MCI and that TELMEX was paid for each and every telephone call made through ATI. The auxiliary switching services offered by ATI allowed expanded use of the U.S. telephone system but all of these services were conducted within Texas and the United States.

15. During 1994, TELMEX and/or SBC demanded that MCI provide lists of its customers that were reselling the MCI 1-800 services provided through TELMEX, the resale of the 1-800 service offered by MCI was specifically authorized under the contract with ATI and under the MCI tariff. Eventually MCI provided a list of customers including ATI and its customers, whether or not ATI acted directly or only as agent for the customers under a letter of agency. MCI TELECOMMUNICATIONS CORP. and MCI INTERNATIONAL INC. agreed and conspired with TELMEX and/or SBC to eliminate ATI as a potential source of competition by restraining its access to telephone communications completely, with regard to 1-800 service from Mexico, which constituted the entire business of ATI.

16. When TELMEX initially demanded a list of MCI customers who were reselling the MCI 1-800 services, MCI resisted. However, TELMEX subsequently threatened to prevent MCI from conducting business in Mexico if MCI did not cooperate in this illegal and tortuous

activity. This conduct of TELMEX constitutes economic duress. The Plaintiff has been damaged by such economic duress and seeks to recover all actual damages as a result thereof.

17. In participating in the refusal to provide services to ATI, MCI breached its contract with ATI and violated its tariff by failing and refusing to perform under the contract agreement with ATI. Most of ATI's I-800 telephone lines from Mexico were cut off in late October or early November 1994. MCI refused to provide replacement service or reconnect the service contracted for.

18. After MCI's refusal to provide replacement service and/or to reconnect the services contracted for, ATI notified MCI to transfer its remaining lines to American Telephone and Telegraph (AT&T), which had also begun offering I-800 service from Mexico. MCI personnel then conspired and cooperated with TELMEX and/or SBC to insure that ATI would not be able to obtain service through AT&T either directly to ATI or for ATI customers for whom ATI acted as an agent. By these actions, MCI and TELMEX and/or SBC interfered with the prospective business relations between ATI A and AT&T.

19. At least one purpose of the cooperation and conspiracy between MCI and TELMEX and/or SBC was to limit access to the international telephone market by improperly restricting access to telephone services by ATI. The effect of this conspiracy was to eliminate all I-800 telephone services of ATI, putting them out of business entirely by early 1995. In addition, these actions reduced or eliminated telephone competition and availability of alternative services between Mexico and the United States and resulted in increased costs to Texas and U.S. companies.

* * *

30. As set forth above, the Plaintiff had a contract with one or more of the MCI defendants which was subject to interference. The defendants, TELMEX and/or SBC, interfered with this contract in a willful and intentional manner. The interference by TELMEX and/or SBC was a proximate cause of damages to the Plaintiff and ATI suffered actual damages or loss as a result thereof.

31. In addition, TELMEX and/or SBC willfully and intentional interfered with the contract between ATI and its customers which was a proximate cause of actual damages or loss to the Plaintiff.

32. As set forth above, at all times pertinent to this cause of action, ATI was continually soliciting new customers and its business continued to increase at a rapid rate. There was a reasonable probability that ATI would have entered into a contractual or business relationship with these customers. The conduct of TELMEX and/or SBC was willful and malicious (intentionally and without just cause or excuse) by intentionally preventing the relationship from occurring with the purpose of harming the Plaintiff. Actual harm or damage was sustained by the Plaintiff as a result.

33. In addition to the above, there was a reasonable probability that ATI would have entered into new and/or additional contractual relationships with the MCI defendants. The conduct of TELMEX and/or SBC was willful and malicious (intentionally and without just cause or excuse) by intentionally preventing the relationship from occurring with the purpose of harming the Plaintiff. Actual harm or damage was sustained by the Plaintiff as a result.

34. The conduct of TELMEX and/or SBC constitutes a contract, combination, or conspiracy in restraint of trade

or commerce occurring wholly or partly within the State of Texas in violation of § 4.05(a) of the Texas Free Enterprise and Anti-Trust Act of 1983, § 15.01 *et seq.* TEX. BUS. & COMM. CODE (the Texas Anti-Trust Act).

35. The conduct of TELMEX and/or SBC further constitutes a monopoly, attempt to monopolize, or a conspiracy to monopolize trade or commerce in violation of §15.05(b) of the Texas Anti-Trust Act.

36. As a result of the above and foregoing, the Plaintiff is a person whose business or property has been injured by reason of the referenced violations of the Texas Anti-Trust Act. The Plaintiff seeks the actual damages sustained as a result thereof.

37. The conduct of TELMEX and/or SBC was willful and/or flagrant. The Plaintiff is therefore entitled to recover threefold the damages sustained pursuant to the Texas Anti-Trust Act.

38. The conduct of TELMEX and/or SBC further constitutes;

a. a contract, combination in the form of trust or otherwise, and/or a conspiracy in restraint of trade or commerce among the several states or with foreign nations; and/or

b. a monopoly, or attempt to monopolize, and/or a combination or conspiracy to monopolize a part of the trade or commerce among the several states, or with foreign nations.

Such conduct is in violation of the Anti-Trust laws of the United States as defined in 15 U.S.C. §12.

39. The Plaintiff has sustained damages as a result of these violations of the Anti-Trust laws and is entitled to recovery threefold the amount of these damages.

40. The defendants acted with a specific intent to cause substantial injury to the Plaintiff.

41. Pleading in the alternative, and not by way of election. When viewed objectively from the standpoint of the actor at the time of its occurrence involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others or of which SBC had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. The Plaintiff therefore seeks punitive or exemplary damages in an amount to ve determined by the trier of fact.

42. At all times material to this cause, the defendant, TELMEX was acting within the authority expressly conferred upon TELMEX by the defendant SBC, or, alternatively, within the authority necessarily implied in order for the defendant TELMEX to perform and exercise the authority granted.

43. With regard to the authority of the defendant, TELMEX to act as alleged, Plaintiff will show as a further alternative that the defendant SBC has in all things ratified the exercise of authority by the defendant, TELMEX in that the defendant SBC has accepted the benefits of the defendant TELMEX's activities.

44. Pleading in the alternative, and not by way of election, the Plaintiff would show as follows:

45. At all times material to this cause, the defendant SBC was acting within the authority expressly conferred upon SBC by the defendant TELMEX, or, alternatively, within the authority necessarily implied in order for the defendant, SBC to perform and exercise the authority expressly granted.

46. With regard to the authority of the defendant, SBC to as alleged, Plaintiff will show as a further alternative that the defendant TELMEX has in all things ratified the exercise of authority by the defendant, SBC in that the defendant TELMEX has accepted the benefits of the defendant SBC's activities.

See Plaintiff's First Amended Original Complaint, pp. 3-9.

II. SUMMARY JUDGMENT REVIEW STANDARD

Rule 56(c) provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for the motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which the moving party believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 25, 106 S.CT. 2548, 2554, 91 L.Ed.2d 265 (1986); *Meadowbriar Home for Children, Inc. v. G.B. Gunn*, 81 F.3d 521, 533 (5th Cir. 1996). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Willis v. Roche Biomedical Lab., Inc.*, 21 F.3d 1368, 1371 (5th Cir. 1994). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the no-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.CT. 2505, 2510, 91 L.Ed.2d 202 (1986); *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993).

Once the movant carries this burden, the burden shifts to the nonmovant to show the existence of a genuine issue for

trial. *Celotex*, 477 U.S. at 323-26, 106 S.CT. at 2553-54; *Matsushita Electric Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585-87, 106 S.CT. 1348, 1355-56, 89 L.Ed.2d 533 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 256-57 106 S.CT. at 2514-15. Unsubstantiated or conclusory assertions that a fact issue exists will not suffice. *See Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993); *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992). The nonmovant "must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." *Krim*, 989 F.2d at 1442. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Liberty Lobby*, 477 U.S. at 248, 106 S.CT. at 2510. Factual disputes that are unnecessary or irrelevant will not be counted. *Id.* (citing 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE §2725, pp. 93-95 (1983)). In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *Liberty Lobby*, 477 U.S. at 254-56, 106 S.CT. at 2513-14.

All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus.*, 475 U.S. at 587, 106 S.CT. at 1356. "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, summary judgment is proper. *Kelly v. Price Macemon, Inc.*, 992 F.2d 1408, 1413 (5th Cir. 1993), *cert. denied*, 510 U.S. 1043, 114 S.CT. 688, 126 L.Ed.2d 656 (1994) (citing *Matsushita*, 475 U.S. at 577-78, 106 S.CT. at 1351). On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." *Id.* (citing *Liberty Lobby*, 477 U.S. at 249-51, 106 S.CT. at

2511). Finally, even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "a better course would be to proceed to a full trial." *Liberty Lobby*, 477 U.S. at 255-56, 106 S.CT. at 2514. Accord *Veillon v. Exploration Services, Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989); 10A C. WRIGHT, A. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2728 (1983).

Utilizing these standards, the Court scrutinizes ATI's claims as to their susceptibility to SBC's motion for summary judgment.

III. ATI's TORTIOUS INTERFERENCE CLAIM

SBC moves for summary judgment as to ATI's claim that it interfered in the contractual relationship between ATI and MCI, ATI and its customers, and ATI's contractual relations with AT&T on the ground that ATI's contracts were unlawful under the laws of Mexico and the United States. SBC also claims that its interference was privileged. Naturally, ATI counters that its service was lawful under the laws of both countries and that SBC's actions were not privileged.

The Court has earlier determined in its Order denying ATI's motion for partial summary judgment that ATI's provision of the I-800 service without a concession from the SCT was unlawful under Mexican law. Therefore, SBC is entitled to summary judgment on ATI's claim for tortious interference with ATI's contractual relations with MCI, ATI's contractual relations with its customers, and ATI's contractual relations with AT&T.[5]

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[5] As explained in its Order granting the MCI defendants motion for summary judgment, ATI would have to show that it had a concession from the SCT in order to prevail on its claim that MCI tortiously interfered with its contractual relations with AT&T. However, the evidence of record is that ATI never acquired a concession from the SCT. Therefore, it could not establish this essential element of its claim.

IV. ATI's ANTITRUST CLAIMS

SBC moves for summary judgment as to ATI's claim for federal and state antitrust violations on several grounds. First, it argues that the requisite conspiracy between two or more persons is lacking due to the fact that SBC is part owner and advisor of Telmex and therefore has a complete unity of economic interest with Telmex. Next, with respect to ATI's federal antitrust claims, it argued that the antitrust laws of the United States do not apply because the acts all occurred in Mexico, the relevant market from which ATI was excluded is the I-800 service market in Mexico, and the acts had no substantial effect on domestic interstate or foreign commerce in the United States. With regard to ATI's claim under the Texas Antitrust Act, SBC contends that the Texas Antitrust Act does not reach the conduct involved in this action because it occurred outside the United States. Moreover, because federal antitrust laws do not reach conduct involving foreign trade or commerce, such conduct is also exempt from the Texas Antitrust Act by virtue of § 15.05(g) of the Texas Business & Commerce Code. The Court will address this last argument first.

Section 1 of the Sherman Act prohibits conspiracy "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. §1. Section 2 of the Sherman Act prohibits monopolization and attempted monopolization "of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. Although the Sherman Act applies to trade and commerce with foreign nations, it applies to foreign anti-trust conduct only to the extent that said conduct produces "some substantial effect in the United States." *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796, 113 S.Ct. 2891, 2909, 125 L.E.d.2d 612 (1993); *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1, 4 (1st Cir. 1997). Specifically, pursuant to § 6a of the Sherman Act, anti-trust conduct involving United States export commerce with for-

eign nations is actionable only if said conduct has a "direct, substantial, and reasonably foreseeable" effect on one of the following: (1) on United States domestic commerce; (2) on United States import commerce; or (3) on export Commerce only to the extent that such conduct injures export business in the United States. 15 U.S.C. § 6a. The limitation of § 6a applies even where the anti-trust conduct originates in the United States or involves American-owned entities operating abroad. *Eurim-Pharm GmbH v. Pfizer, Inc.*, 539 F.Supp. 1102, 1106 (S.D.N.Y. 1984).

Earlier in this case the Court dismissed ATI's claims against Telmex, finding that it lacked personal jurisdiction over Telmex. In the course of addressing the jurisdictional issue, the Court was required to determine whether ATI had stated a claim against Telmex for violation of the Sherman Act and found that it had not, observing:

> [A]ll the activities of Telmex of which ATI complains occurred outside the United States. Moreover, the market from which ATI alleges to have been excluded by Telmex is the I-800 service market in Mexico, outside the United States. Neither the fact that ATI is an American corporation or that SBC and MCI are American corporations provide the requisite nexus with American trade that would bring the alleged illegal activity within the purview of the Sherman Act. *See Power East Limited v. Transamerica Delaval Inc.*, 558 F.Supp. 47, 49 (S.D.N.Y. 1983) (Sherman Act claim of plaintiff, a Cyprus corporation, failed to state cause of action, where activities complained of all occurred outside United States, market from which plaintiff was supposedly excluded was outside the United States, and plaintiff made no suggestion of a "relevant market" in linked States nor mentioned any American competitors; fact that principal shareholder of plaintiff was United States citizen and one of the defendants was a corporation organized

within States did not provide requisite nexus with American trade that would bring alleged illegal activity within purview of Sherman Act). *See also Optimum v. Legent Corporation*, 926 F.Supp. 530 (W.D.Pa. 1996) (holding that foreign corporation which marketed and distributed computer software products of American corporation in Argentina failed to establish that termination of its marketing contract by another foreign corporation resulted in anticompetitive effect on United States' domestic commerce, and thus, district court lacked subject matter jurisdiction over corporate distributor's claim that termination of marketing contract violated Sherman Act; allegation that income flowed between corporations was insufficient to establish requisite domestic effect and distributor, a foreign corporation, could not maintain action under Sherman Act based merely upon injury to United States exporters attempting to enter Argentine computer software market).

As observed by the Court of Appeals for the Tenth Circuit:

> The principal purposes of the antitrust laws are protection or American consumers and American export and investment opportunities. If American interests are at stake we may impose liability for conduct outside our borders that has consequences within our borders. *See Alcoa*, 148 F.2d at 443. When the contacts with the United States are few, the effects upon American commerce minimal, and the foreign elements overwhelming, however, we do not accept jurisdiction. We believe that the analysis set forth in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d at 613-15, contains the proper elements for consideration. To support jurisdiction of American court, plaintiff must first show that the challenged activity had an actual effect on

> United States commerce. Then we must decide if the interest of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Id.* at 613.

Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869 (10th Cir. 1981). In short, the antitrust laws of the United States do not regulate the competitive conditions of other nations' economies. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). *See also Industrial Inv. Develop. Corp. v. Mitsui & Co.*, 671 F.2d 876, 883 (5th Cir. 1982) (district court should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity, conflicts of law or international law).

In view of the fact that the conduct of Telmex all occurred in Mexico, that the market from which ATI claims to have been excluded is the I-800 service in Mexico, and that the resultant economic consequences are felt predominately by Mexican consumers, the Court finds it does not have subject matter jurisdiction of ATI's antitrust claims against Telmex.

See Court's Order of June 20, 1997, pages 8-10.[6]

Even though they were made in the context of deciding if Telmex was subject to the personal jurisdiction of this Court, the Court finds that these findings are also determinative of whether or not ATI has a claim against SBC under the Sherman Act. As the Court noted in the above-quoted excerpt from its previous order, the market from which ATI claims to have been excluded is the I-800 service in Mexico. Likewise,

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[6] Docket Entry No. 74.

the resultant economic consequences of Telmex and the other defendants terminating ATI's I-800 service was felt predominately in Mexico by Mexican consumers. Although ATI claims that it has evidence that the actions SBC took with Telmex to terminate ATI's I-800 service occurred in the United States, the Court finds that this is not enough to maintain a claim under the Sherman Act against SBC. Likewise, the fact that SBC is an American corporation does not provide a sufficient nexus with American trade to bring the alleged illegal action of SBC within the purview of the Sherman Act. *See Power East Limited v. Transamerica Delaval Inc.*, 558 F.Supp at 49. Furthermore, ATI's assertion that the income generated by its I-800 service flowed into the United States is insufficient to establish the requisite domestic effect. *Optimum. S.A.*, 926 F.Supp. at 533 (assertion by plaintiff that the income in issue flowed and would continue to flow between corporations located in the United States and corporations located in Argentina deemed insufficient to establish the requisite domestic effect required by §6(a).

Accordingly, the Court finds that ATI cannot maintain its federal antitrust claims against SBC. Consequently because the antitrust laws of Texas do not reach activities exempt from the operation of the federal antitrust laws,[7] ATI's claims against SBC for violation of the Texas antitrust laws likewise fail to survive SBC's summary judgment motion.

CONCLUSION

Based on the above findings, it is hereby ORDERED that the Motion for Summary Judgment of SBC Communications Inc., SBC International, Inc., and SBC International Latin America, Inc. be, and the same is hereby, GRANTED as to

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[7] Section 15.05 of the Texas Free Enterprise and Antitrust Act provides in pertinent part that "[n]othing in this section shall be construed to prohibit activities that are exempt from the operation of the federal antitrust laws, 15 U.S.C. Section 1 et seq." Tex.Bus. & Com.CodeAnn. § 15.05(g).

ATI's claims for tortuous interference with contractual relations and ATI's claims for violation of federal and Texas antitrust laws.

SIGNED this the 5th day of August, 1998.

/s/ D. W. Suttle
D. W. SUTTLE
Senior United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil No. SA-96-CA-1064

ACCESS TELECOM, INC.,

Plaintiff,

v.

MCI TELECOMMUNICATIONS, INC., *et al.*

Defendants.

ORDER

The matter before the Court is the Motion for Summary Judgment filed by defendants MCI Telecommunications Corporation and MCI International, Inc. ("MCI") on July 29, 1997,[1] Plaintiffs Response filed on August 12, 1997,[2] ATI's Supplement to Plaintiff's Motion for Summary Judgment and Response to Defendant MCI Telecommunication Corporation's and MCI International, Inc.'s Motion for Summary Judgment filed on August 13,1997[3] and Supplement to Plaintiffs Response to the Motion for Summary Judgment of MCI filed on August 21, 1997,[4] MCI's reply to ATI's response filed on August 26, 1997,[5] the letter brief submitted by MCI

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[1] Docket Entry No. 80.

[2] Docket Entry No. 92.

[3] Docket Entry No. 94.

[4] Docket Entry No. 96.

[5] Docket Entry No. 107.

on June 29, 1998, and the letter in response submitted by ATI on July 2, 1998. Having reviewed these documents, the supporting exhibits and affidavits attached thereto and the relevant case law, the Court enters the following order.

I. FACTUAL BACKGROUND

ATI began operating in June 1993. One of the businesses it engaged in was the reorigination of international long distance calls from its customers in Mexico to parties located in the United States at rates cheaper than the customer would pay if it used the long distance services of Telefonos de Mexico ("Telmex"). MCI is a provider of interstate and international telecommunications services to both commercial and residential users. On June 30, 1993, ATI executed a letter of authorization selecting MCI as its long distance carrier and provider of 800 numbers. On July 7, 1993, ATI executed an MCI Global Vision Enrollment Form and Agreement. On November 30, 1993, ATI executed an MCI Global Vision Enrollment Form replacing the July 7, 1993 agreement. The November 30, 1993 enrollment form incorporated by reference the terms and conditions of MCI Tariff FCC No. 1 ("the Tariff"). On August 6, 1994, ATI executed an MCI Vision VIP Enrollment Form and Agreement replacing the November 30, 1993 Agreement. The August 6, 1994 Enrollment Agreement also incorporated by reference the Tariff. MCI International ("MCI") is a participating carrier under the Tariff. Beginning in July 1994, Telmex began terminating ATI's I-800 services, claiming that ATI's I-800 service was in violation of Mexican law.

ATI filed the instant lawsuit against MCI and the other defendants in the 734th Judicial District Court, Bexar County, Texas. ATI alleges the following seven causes of action against MCI: (1) breach of contract; (2) negligent misrepresentation; (3) promissory estoppel; (4) tortious interference with contact; (5) tortious interference with prospective relations; (6) violation of the Texas Antitrust Act; and (7) viola-

tion of the Sherman Act. MCI now moves for summary judgment on a variety of grounds.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Federal Rules of Civil Procedure 56(c); *Celotex Corp v. Catrett* 477 U.S. 319, 322, 106 S.Ct. 2548, 2551, 91 L.Ed.2d 268 (1985); *Lodge Hall Music Inc. v. Waco Wrangler Club, Inc.*, 831 P.2d 77, 79 (5th Cir. 1987). The party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Burfield v. Brown, Moore & Flint, Inc.*, 51 F.3d 583, 588 (5th Cir.1995). A fact is "material" if its resolution in favor of one party might affect the outcome of the action under governing law. *Anderson v. Liberty Lobby*, 477 U.S. 252, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). No genuine issue of material fact exists if a rational trier of fact could not find for the nonmoving party based on the evidence presented. *National Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 712 (5th Cir. 1994).

To withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial must come forward with evidence to support the essential elements of its claim. *Id.* (citing *Celotex Corp.*, 477 U.S. at 321-323). "[A] complete failure of proof concerning an essential element of the nonmoving party's cases renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323.

The Court must consider all evidence in the light most favorable to the nonmoving party. *National Ass'n of Gov't Employees*, 40 F.3d at 712-713. "Conclusory allegations unsup-

ported by specific facts, however, will not prevent the award of summary judgment . . . ." *Id.* at 713 (quoting *Anderson*, 477 U.S. at 249).

Thus, summary judgment is appropriate when, in the absence of factual disputes, one or more of the essential elements of a claim or defense before the court is not in doubt and judgment may be entered on the basis of purely legal considerations. *Fontenot v. Upjohn Co.*, 780 F.2d 1194 (5th Cir. 1986). As stated by the Supreme Court in *Celotex*, "[t]h[e]standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . ." 477 U.S. at 323, 106 S.Ct. at 2552 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)). Therefore, by its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. 477 U.S. at 247-248, 106 S.Ct. at 2510 (emphasis in original).

With regard to materiality, the substantive law will identify which facts are material. Only diputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Id.*

Finally, with regard to the role of the trial court in reviewing a motion for summary judgment and the evidence offered in support thereof, it is well settled that the Court's only function is to ascertain whether there is an issue of material fact to be tried. A trial court is not at liberty to decide any factual issues it finds in the records or to make credibility determinations. As explained by the Supreme Court:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he

> is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson, 477 U.S. at 255, 106 S.Ct. at 2513. In other words, a judge assessing the "persuasiveness" of evidence presented on a motion for summary judgment may discount such evidence as unspecific or immaterial, but not as unbelievable. *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987).

Utilizing these standards, the Court scrutinizes ATI's claims as to their susceptibility to MCI's motion for summary judgment.

III. ATI'S STATE LAW CLAIMS: PREEMPTED BY THE FEDERAL COMMUNICATIONS ACT?

MCI first moves for summary judgment as to ATI's state statutory and common law claims on the ground that they are preempted by the Federal Communications Act, 47 U.S.C. §§151-613 ("FCA"). ATI takes the position that its claims are preserved by the savings clause contained in the FCA.

The preemption doctrine is derived from the Supremacy Clause in the United States Constitution which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const art. VI, cl. 2. Under the Supremacy Clause, state laws which "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, are invalid." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604, 111 S.Ct. 2476, 2481, 115 L.Ed.2d 532 (1991) (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 21, 6 L.Ed. 23 (1824)).

The primary inquiry in all preemption cases is the objective or purpose of Congress in enacting the particular statute. *See Allis-Chalmers Corp v. Lueck*, 471 U.S. 202, 208, 105 S.Ct. 1904, 1909-10, 85 L.Ed.2d 206 (1985); *Cipollone v. Liggett Group, Inc*, 505 U.S. 504, 517, 112 S.Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992). Congressional intent may be expressly stated in the language of the statute, or may be implied by the structure and purpose of the statute. *See Cipollone*, 506 U.S. at 517, 112 S.Ct. at 2617. Absent an express congressional statement, state law may be preempted in two situations; first, if the state law actually conflicts with federal law, *see id; Pacific Gas & Elec. Co. v. Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d *752* (1983); or, second, federal law so thoroughly occupies a legislative field "' as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone*, 505 U.S. at 517, 112 S.Ct. at 2617 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed.1447 (1947)).

In the instant case, MCI argues that the comprehensive regulatory scheme of the Communications Act evidences Congress' intent to preempt the entire field. The express purpose of the Communications Act is to "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available . . . to all the people of the United States a rapid, efficient. . . . Communication service with adequate facilities at reasonable charges." 47 U.S.C. §151 (1988). To effectuate that end, the Act governs "all interstate . . . communications by wire or radio and. . . . all persons engaged within the United States in such communication," 47 U.S.C. §152(a) and provides that an interstate telephone carrier's "charges, practices, classifications, and regulations for and in connection with [its] communications service, shall be just and reasonable," 47 U.S.C § 201(b).

In support of its preemption argument, MCI cites the Court primarily to *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486 (2d Cir. 1968). In *Ivy*, the plaintiff alleged grossly negligent and unreasonably delayed installation of telephone lines and grossly negligent operation of the lines, and claimed that federal jurisdiction existed under the Communications Act. The district court dismissed the complaint for lack of subject matter jurisdiction, finding that the claims of negligence and breach of contract did not arise out of the Communications Act, but rather out of state tort and contract law. On appeal, the Second Circuit reversed and remanded, holding that although the plaintiff's claims were not governed by the Communications Act, such claims were governed by federal common law emanating from the Communications Act. Based on its review of several Supreme Court cases, the Second Circuit concluded that "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and . . . the states are precluded from acting in this area." *Ivy*, 391 F.2d at 491. Citing this language, MCI contends that ATI's state law claims, because they relate to communications services, are preempted by the Communications Act. As explained below, MCI's argument fails.

As pointed out by ATI in its response, many cases decided after *Ivy* have found that state law claims such as those asserted by ATI in this case are not barred, but have been preserved by the "savings clause" of the Communications Act. For example, in *Cooperative Communications, Inc. v. AT&T*, 867 F.Supp. 1511 (D. Utah 1994), CCI, the plaintiff, an aggregator telecommunications company,[6] brought state law

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[6] As an aggregator company, CCI purchased large quantities of long distance communication services from AT&T at discount rates which it then sold to persons or entities using smaller amounts of long distance

claims against AT&T for intentional interference with prospective economic relations, interference with contract, business disparagement, breach of covenant of good faith and fair dealing, unfair competition, violation of the Utah Uniform Trade Secrets Act, and violation of the Federal Communications Act. AT&T, relying on *Ivy*, moved for dismissal of the state claims on the ground that they were preempted by the Communications Act. The district court denied the motion, explaining:

> The Court in *Ivy* did not address the "savings clause" of the Communications Act, set forth at section 414. The savings clause provides:
>
> § 414 Exclusiveness of Chapter
>
> > Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.
>
> 47 U.S.C. §414. At issue, then, is whether savings clause preserves CCI's state causes of action against AT&T.
>
> Courts in other jurisdictions have held that the savings clause preserves causes of action for breach of duties distinguishable from those created under the Act. For example, in *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 98 Ill. Dec. 24, 493 N.E.2d 1045, *cert. denied* 479 U.S. 949, 107 S.Ct. 434, 93 L.Ed.2d 384 (1986), the Illinois Supreme Court ruled that "state law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414." *Id.*, 98 Ill. Dec. at 30, 493 N.E.2d at 1051. In *Kel-*

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service at a price lower than they could have obtained from AT&T directly.

lerman, the plaintiffs brought state law claims of fraud and deceptive advertising against MCI, a provider of long-distance telephone service. MCI argued that the claims were preempted by the Communications Act, relying, in part, on *Ivy*. The *Kellerman* court rejected that argument, and in reviewing the holding *of Ivy*, as well as the language of the savings clause, stated:

> [W]e believe that section 414, when considered in the context of the entire act, should be construed as preserving State-law "causes of action for breaches of duties distinguishable from those created under the act." State-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414.

Id. (quoting *Puerto Rico Telephone Co. v. F.C.C.*, 553 F.2d 694, 708 (1st Cir. 1977)).

Similarly, *in Bruss Co. v. Allnet Communications Services*, 606 F.Supp. 401 (N.D.Ill. 1985), the court held that section 414 preserved the common law claims of the plaintiffs. The plaintiffs had sued Allnet, a provider of long-distance telephone services, alleging common law fraud and violations of Illinois' deceptive trade and consumer fraud acts. The court found that the duties owed by the defendants under the common law causes of action were different from those duties created by the Communications Act. The court stated:

> None of these causes of action conflicts with provisions of the Communications Act or interferes in any way with the regulatory scheme implemented by Congress. The Court therefore concludes that § 414 applies to preserve these causes of action.

Id. at 411. *See also Financial Planning Inst., Inc. v. American Tel & Tel. Co.*, 788 F.Supp. 75 (D.Mass. 1992). The *Financial Planning* court clarified the intended function of the savings clause:

> Not only did Congress not express an intent to provide for an exclusive federal remedy for a breach of contract for telecommunication services, but by enacting the savings clause, Congress specifically provided for the preservation of existing statutory and common law claims in addition to federal causes of action.

Id. at 77.

In the instant case, six of CCI's claims are based on state common law or state statutory grounds: intentional interference with prospective economic relations; interference with contract; business disparagement; breach of the covenant of good faith and fair dealing; unfair competition; and violation of the Utah Uniform Trade Secrets Act. CCI contends that these claims exist as separate cause of action, and were not created by the Communications Act. AT&T has not cited to any specific sections of the Communications Act which conflict with CCI's state law claims. Additionally, AT&T's contention that these claims are preempted ignores the purpose underlying section 414. In enacting the Communications Act, it is manifest that Congress intended to occupy the field of telecommunications, in order to make available to all people of the United States a rapid, efficient, reasonably-priced communications service, governed by one uniform regulatory scheme. However, inclusion of the savings clause clearly indicates Congress' intent that independent state law cause of action, such as interference with contract or unfair competition, not be subsumed by the Act, but remain as separate causes of action. Hence, while some state law claims may relate to

providers of telecommunications service, but nevertheless stand as independent claims not arising under the Communications Act.

Based on the foregoing, this Court holds that section 414 of the Federal Communications Act preserves CCI's state law claims.

867 F.Supp. 1515-1516.

Similarly in *In re Long Distance Telecommunications Litigation*, 831 F.2d 627 (6th Cir.1987), the Sixth Circuit found that the district court erred in denying the plaintiffs' motion to remand on the ground that their state law claims for deceit and fraud, based on the defendant long distance telephone service providers failure to notify them of the practice of charging for uncompleted calls, were preempted by the Communications Act. According to the Sixth Circuit, those claims, unlike those based on §201 of the Act, do not require agency expertise for their treatment and are "within the conventional experience of judges." 831 F.2d at 633. Moreover, the alleged torts involved in its case, which involved a failure by the defendants to notify customers of a practice, were not like those involved in *Ivy*, which involved the level of service provided by the defendants. Finally, the Sixth Circuit noted, the savings clause of the Communications Act was virtually identical to that of the savings clause before the Supreme Court in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976), a case in which the Supreme Court found that the common-law action for fraudulent misrepresentation and the Aviation Act, not being "absolutely inconsistent," could coexist, "as contemplated by §1106 [the saving clause of the Aviation Act]." 831 F.2d at 634 (quoting *Nader*, 426 U.S. at 300, 96 S.Ct. at 1985).

This Court finds that the reasoning of *Cooperative Communications, Inc.* and *In re Long Distance Telecommunications Litigation* applies in the instant case. ATI's state law

claims do not involve the level of service provided by MCI. Rather, they concern alleged acts of misrepresentations by MCI to induce ATI to enter into the contract and subsequent intentional torts by MCI to eliminate ATI from the 1-800 market in Mexico. Therefore, based on *Cooperative Communications, Inc.* and *In re Long Distance Telecommunications Litigation* and the reasoning contained therein, the Court finds that ATI's state law claims are preserved by the savings clause of the Communications Act.

IV. THE FILED TARIFF DOCTRINE

MCI also argues that it is entitled to summary judgment as to ATI's state law claims on the ground that they are barred by the so-called filed tariff doctrine. The Court finds that MCI is correct only to the extent that ATI attempts to assert a claim against it for failing to provide the I-800 service after Telmex disconnected it.

The MCI Tariff provides that MCI 800 Service International Call Coverage may not be acquired and used for resale in foreign jurisdictions where MCI's PTT Partners either have blocked or interrupted MCI 800 or have threatened to do so, because of the resale activities being conducted within that country by MCI customers.[7] MCI's tariff also provides that MCI is not liable for any act or omission of any other company or companies furnishing a portion of this service.[8] Finally, MCI's Tariff prohibits use of MCI's service for any unlawful purpose.[9]

The Court has previously determined that ATI's resale of the I-800 service to Mexican customers without a concession

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[7] *See* MCI's Tariff, Section C, para. 3.0862 n.2. MCI's Tariff is attached to the Affidavit of James E. Kerr, labeled as Tab D in the Appendix to MCI's Motion for Summary Judgment (Docket Entry No. 80).

[8] See MCI's Tariff, Section B, para. 4.04, 17th revised page 11.

[9] See MCI's Tariff, Section B, para. 6.061, 6th revised page 12.2.2.

from the SCT was unlawful under Mexican law. Furthermore, by ATI's own admission, it was Telmex who terminated ATI's I-800 service. Therefore the above-cited provisions of MCI's Tariff apply to bar any attempt by ATI to hold MCI liable under a breach of contract claim for failing to provide the I-800 service after its disconnection by Telmex. However, as to ATI's claim that MCI conspired with Telmex and SBC to interfere with its attempt to contract with AT&T for the I-800, the Court finds, for reasons set out below, that the filed-tariff doctrine does not apply.

Section 203 of the Communications Act requires common carriers to file with the Federal Communications Commission a listing of the terms and conditions under which they will provide services to their customers. This listing, called a tariff, also set forth the charges, classifications, practices and regulations for that particular tariff. *MCI Telecommunications v. Best Telephone Co.*, 898 F.Supp. 868, 872 (S.D.Fla. 1994). Once filed, the tariff exclusively controls the rights and liabilities of the parties as a matter of law. *Id.* (citation omitted). Because the tariff is filed, customers are presumed to have constructive knowledge of the rates governing their telecommunications service. *Marcus v. AT&T Corp.*, 938 F.Supp. 1158, 1159 (S.D.N.Y. 1996)(citing *Kansas City S.R. Co. v. Carl*, 227 U.S. 639, 653, 33 S.Ct. 391, 395, 57 L.Ed. 683 (1913)). Consequently, any privately negotiated rates that depart from the filed rate are superseded. 47 U.S.C. §203(c); *Armour Packing Co. v United States*, 209 U.S. 56, 81, 28 S.Ct. 428, 435, 52 L.Ed. 681 (1908). This doctrine, commonly referred to as the "filed rate doctrine," bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable. *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994). The filed rate doctrine prevents an aggrieved customer from enforcing contract rights that contravene governing tariff provisions or from asserting estoppel against the carrier. *Pay Phone*

Concepts, Inc v. MCI Telecommunications Corp., 904 F.Supp. 1202, 1207 (D.Kan. 1995).

The purpose of the filed rate doctrine is two-fold. First, the Supreme Court has long-held that the reasonableness of rates in a regulated industry is a question solely for the governing regulatory body. See *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). Second, it prevents utilities from discriminating in the prices they charge for the same service among different ratepayers. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). Thus, non-justiciability and anti-discrimination are the core purposes of the doctrine. *Fax Telecommunicaciones* v. *AT&T*, 952 F.Supp. 946, 951 (E.D.N.Y. 1996).

IN CCI, *supra*, AT&T argued, like MCI does here, that the plaintiff's state law claims were barred by the filed tariff doctrine. The district court rejected the argument, observing:

> In the instant case, AT&T points out that section 203 of the Act requires filing of tariffs not only as to the rates to be charged, but also with regard to the classifications, regulations, and practices affecting such charges. AT&T asserts that CCI's claims pertain to AT&T's business practices in providing telecommunications services, and therefore, inasmuch as CCI's claims against AT&T are based upon the alleged misrepresentations by AT&T regarding its rates, practices, or services, those claims are barred by the filed tariff doctrine. This Court declines to read the word "practices" so broadly. AT&T has cited no case law in support of such a reading.
>
> Additionally, CCI is quick to point to a major difference between typical filed-tariff cases and the case at bar. Unlike the plaintiff in *Marco*, who was attempting to enforce a contract containing rates below the tariff rates, CCI is not seeking to enforce AT&T's alleged

> misrepresentations. Rather, CCI claims that AT&T made fraudulent representations to CCI's customers regarding the rates that CCI would charge and the dealings between AT&T and CCI. CCI is seeking damages for intentional interference with prospective economic relations and business disparagement resulting from those alleged misrepresentations. Allowing CCI to proceed with its state law claims will not result in discrimination against other AT&T customers in favor of CCI. Therefore, this Court holds that the filed tariff doctrine does not act to bar CCI's state law claims against AT&T.

867F.Supp. at 1518-1519.

The same reasoning applies in the case at bar. ATI's claims in no way concern the rates charged by MCI. Likewise, ATI does not seek to enforce any alleged misrepresentations by MCI concerning rates. Rather, ATI is seeking damages for MCI's alleged intentional misrepresentations during the negotiation of the contract and the intentional interference by MCI with its business relations by its termination of the I-800 service and by its conspiring with Telmex and the other defendants to prevent ATI from obtaining the I-800 service from AT&T.

Moreover, MCI's Tariff FCC No.1 specifically provides that "MCI's liability for willful misconduct, if established as a result of judicial or administrative proceedings, is not limited by this tariff."[10] In *Fax Telecommunicaciones*, the district court rejected AT&T's argument that similar language[11] in its

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[10] See MCI's Tariff F.C.C No. 1, Section B, para. 4.02, 13th Revised page 10. MCI's Tariff F.C.C. No. 1 is attached to the Affidavit of James E. Kerr, labeled as Tab D in the Appendix to MCI's Motion for Summary Judgment (Docket Entry No. 80).

[11] AT&T's tariff provided in pertinent part that:

filed tariff did not establish a separate cause of action for willful misconduct, but rather merely modified the tariffs limitation of liability in certain narrow circumstances, noting:

> AT&Ts argument . . . places the exception before the rule. First, although the Court agrees that the entire liability provisions of the tariff must be read as a whole, the more reasonable reading of the provision is that AT&Ts liability *for* willful misconduct is limited only when a dispute relates to the installation, maintenance, provision or repair of service. In claims unrelated to these specific instances, AT&T is liable for willful misconduct.

952 F.Supp. at 955.

A case more directly on point is *MCI Telecommunications Corp. v. TCI Mail, Inc.*, 772 F.Supp. 64 (D.R.I. 1991). In *TCI Mail*, MCI brought suit against TCI to recover a deficiency in payment for telecommunications services provided to TCI. TCI filed a counterclaim in which it alleged that, before agreeing to provide the service, MCI had represented that it would charge a much lower rate than the rate it ultimately charged. TCI claimed that it had an oral agreement with MCI, and that MCI breached the contract and committed tortious misrepresentation. MCI moved for dismissal all of TCI's counterclaims as barred by the filed tariff doctrine. Initially, the district court found that the contractual relations between MCI and TCI was governed by MCI Tariff FCC No. 1, the same tariff which governs the contractual relations between ATI and MCI in the instant case. However, the district court

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The Company's liability, if any, for its willful misconduct is not limited by this tariff. With respect to any other claim or suit, by a Customer or by any others, for damages associated with the installation, provision, termination, maintenance, repair or restoration of [long-distance service] . . . the Company's liability, if any, shall not exceed an amount equal to the initial period charge provided for under this tariff.

found that this conclusion did not end its analysis of TCI's counterclaims, explaining:

> By its own terms, the MCI Tariff does not limit MCI's liability if judicial or administrative proceedings establish that MCI committed "willful misconduct." MCI Tariff, section B, para. 492, 9th Revised page 10. Viewing the pleadings in the light most favorable to TCI, as required by Fed.R.Civ.P. 12(b)(6) and 8(f), this Court understand TCI's Count I to allege that MCI's actions constituted "willful misconduct" and therefore violated the MCI Tariff, an alleged breach of contract. Count II similarly claims that the MCI Tariff allows liability for MCI's alleged "willful misconduct," which allegedly support tort liability for intentional misrepresentations.
>
> Does the Communications Act of 1934 prohibit recovery by TCI under any theory of liability, regardless of the terms of the MCI Tariff? Certainly, the tariff as a whole, and not merely the rates contained therein, is paramount. Otherwise, any provisions of the MCI Tariff would be meaningless. The entire MCI Tariff must be controlling, including the "willfull misconduct" clause. *See Stand Buys, Ltd. v. Michigan Bell Tel. Co.*, 646 F.Supp. 36, 37-38 (E.D.Mich. 1986) (applying "willful misconduct" clause of carrier's tariff, but concluding that no evidence of willful misconduct existed at summary judgment stage); *Pilot Indus. v. Southern Bell Tel. & Tel. Co.*, 495 F.Supp. 356, 361-62 (D.S.C. 1979) (applying clause in filed tariff allowing liability for willful or wanton conduct, but finding no evidence of willfulness or wantonness at summary judgment stage); *Sommer v. Mountain States Tel. & Tel. Co.*, 21 *Ariz. App.* 385, 387-88, 519 P.2d 874, 876-77 (1974) (holding that clause in filed tariff permitted recovery for willful acts).
>
> *The MCI Tariff itself does not clearly preclude a contract or tort claims against MCI based on its alleged*

"willful misconduct." MCI has not attempted, moreover, to charatcterize the alleged representations of its salespeople as being outside the scope of their agency relationship. Recovery by TCI, therefore, is not precluded.

772 F.Supp. at 67-68 (emphasis added).

Like the courts in *Fax Telecommunicaciones* and *TCI*, this Court finds that the liability language contained in MCI's tariff does not preclude a tort claim against MCI based on its alleged willful misconduct. To the contrary, it expressly states that MCI's liability is not limited if it is determined in a judicial or administrative proceeding that MCI engaged in willful misconduct. However, it does bar ATI's claim for negligent misrepresentation, inasmuch as that claim does not involve willful misconduct by MCI.

Accordingly, the Court finds that MCI's argument that ATI's state law claims are barred by the filed tariff doctrine fails except as to ATI's claim of negligent misrepresentation and breach of contract. As to those two claims, MCI is entitled to summary judgment.

V. ATI's PROMISSORY ESTOPPEL CLAIM

MCI moves for summary judgment on ATI's claim for promissory estoppel on the ground that promissory estoppel is not available where a contract exists between the parties governing the subject matter of the promise. ATI contends that it is entitled to maintain its promissory estoppel claim because the contract it had with MCI contains no provisions relating to or governing the promises made by MCI. For the reasons set out below, the Court finds that the promissory estoppel claim is not available to ATI.

Promissory estoppel is normally a defensive theory. However, it may be asserted by a plaintiff as an affirmative ground for relief. *El Paso Healthcare System, Ltd v. Piping Rock Corp.*, 939 S.W.2d 695, 698 (Tex.App.—El Paso, 1997, no

writ) (citing *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 707 (Tex.App.—Houston[1st Dist.] 1988, writ denied)); *Farah v. Mafrige & Kormanik P.C.*, 927 S.W.2d 663 (Tex.App—Houston [1st Dist]. 1996); *In re Texas Mortgage Services Corp.*, 761 F.2d 1068 (5th Cir. 1985). Under the doctrine of promissory estoppel, a promise may be binding if the promiser should reasonably expect that the promise will induce action or forbearance, the promise does in fact induce such action or forbearance, and the enforcement of the promise is necessary to avoid injustice. *Piping Rock*, 939 S.W.2d at 699 (citing *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937 (Tex. 1972); *Adams*, 754 S.W.2d at 707). However, if a valid contract between the parties covers the alleged promise, promissory estoppel is inapplicable to that promise. Instead, the wronged party must seek damages under the contract. 939 S.W.2d at 699 (citing *Guaranty Bank v. Lone Star Life Ins. Co.*, 568 S.W.2d 431, 434 (Tex.Civ.App—Dallas 1978, *writ ref'd n.r.e.*)).

Under Texas law, the basic requirements of a promissory estoppel claim are: "(1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment." *Clardy Mfg. Co. v. Marine Midland Business Loans*, 88 F.3d 347, 360 (5th Cir. 1996) (quoting *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983)). Texas courts have also established a fourth and separate requirement of a "definite finding that *Injustice can be avoided only by the enforcement of the promise*." *Clardy*, 88 F.3d at 360 (quoting *City of Beaumont v. Excavators & Constructors, Inc.*, 870 S.W.2d 123, 137 (Tex.App.—Beaumont 1993, writ denied) (emphasis in original)). In addition, the courts have emphasized that "estoppel requires a *reasonable or justified* reliance on the conduct or statement of the person sought to be estopped by the person seeking the benefits of the doctrine." *Clardy*, 88 F.3d at 360 (quoting *Traco Inc. v. Arrow Glass Co.*, 814 S.W.2d 186, 190 (Tex.App.—San Anto-nio 1991, writ denied) (emphasis in original and inter-

nal quotation marks omitted)), *cert. denied*,—U.S.—, 117 S.Ct. 740, 136 L.Ed.2d 679.

ATI makes the following allegations with regard to its promissory estoppel claim:

> 11. During or before 1992, TELMEX entered into an agreement with MCI INTERNATIONAL INC. to provide international 800 (I-800) service from Mexico to the United Sates. MCI INTERNATIONAL INC. provided this service to MCI TELECOMMUNICATIONS CORP. during and since 1992. MCI TELECOMMUNICATIONS CORP. advertised and offered for sale to its customers I-800 service for calls originating from Mexico, based on the services provided by TELMEX.
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> 12. During 1993 and 1994, ATI contracted with MCI TELECOMMUNICATIONS CORP. for I-800 services from Mexico for itself and as agent for various customers. In addition to the I-800 service from Mexico, ATI offered a switching service carried out in Texas and elsewhere in the United States whereby customers could complete calls to a variety of U.S. 800 and other telephone numbers from Mexico. MCI represented to ATI that it had the authority and capacity to contract for telephone services through TELMEX between Mexico and the United States; that the proposed activity by ATI was within the terms of the tariff and in all respects a legal reuse of the services provided; that services would continue under the same legal terms in the future; that the rights and obligations of the parties under contract were enforceable and that MCI would provide the same services in the future with special accommodations to ATI as its business increased. These and other promises and representations induced ATI to enter into an agreement with MCI and were a producing cause of damages to ATI.

* * * *

20. The Defendant, MCI, further made representations in the course of its business or in a transaction in which it had a pecuniary interest and MCI supplied false information for the guidance of the Plaintiff. MCI failed to exercise reasonable care or competence in obtaining or communicating the information to the Plaintiff. The Plaintiff suffered a pecuniary loss by justifiably relying on the representations made by MCI and the Plaintiff hereby sues for all damages sustained as a result of the negligent misrepresentations made by MCI.

21. It was reasonably foreseeable that the plaintiff would rely on the promises made. Further, plaintiff substantially relied on the promises made by the MCI defendants to its detriment. Injustice could be avoided only be (sic) enforcement of these promises. Plaintiff therefore affirmatively asserts the common law doctrine of promissory estoppel and hereby asks the jury to award it all damages sustained as a result of the conduct of the MCI defendants.

See Plaintiff's First Amended Complaint, pages 3 and 5.[12]

As the Court understands it, ATI is alleging that MCI made three misrepresentations to it during the negotiation of the contract. First, MCI allegedly represented that it had authority to sale the I-800 service to ATI. Second, MCI represented that ATI's resell of the I-800 service was within the terms of the MCI Tariff. Finally, MCI represented that ATI's proposed resell of the 1-800 was legal under Mexican law.

With regard to ATI's allegation that MCI told it that its resell of the I-800 service was permissible under Mexican law, the Court has already determined in passing on ATI's Motion for Partial Summary Judgment that ATI's provision of the

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[12] Docket Entry No. 51.

I-800 service to Mexican residents without first obtaining a concession or permit from the SCT was illegal under Mexican law. Furthermore, ATI has cited the Court to no case, nor has the Court found any case in which a party asserted, much less prevailed on, a claim of promissory estoppel on the ground that the other party misquoted or misrepresented the law. It seems too obvious to state that ATI could not reasonably or justifiably rely on MCI's representation as to what the Mexican law was with respect to ATI's resell of the I-800 service. ATI could and should have ascertained for itself whether or not its resell of the I-800 service was legal under Mexican law. Therefore, MCI is entitled to summary judgment on this particular claim of promissory estoppel.

As for ATI's claim that MCI represented that it had the authority and capacity to contract with ATI to provide the I-800 service, the Court finds that ATI has not come forward with any evidence that MCI did not have authority to enter into the contract with ATI for the provision of the I-800 service to ATI. In fact, ATI has consistently maintained the position that its purchase of the I-800 service from ATI for resale to its customers was legal under Mexican law and that Telmex had no legal right to disconnect the service. Implicit in this assertion is that MCI had the authority to contract with ATI for the I-800 service.

The final misrepresentation allegedly made by MCI was that its resell of the I-800 service to ATI was within the terms of the MCI Tariff. As with ATI's earlier claim that MCI misrepresented that ATI's resell of the I-800 service was legal under Mexican law, the Court finds that ATI cannot show that its reliance on this alleged misrepresentation by ATI was reasonable or justified. The MCI Tariff was filed and open for inspection by ATI to determine for itself whether or not MCI was permitted to resell the I-800 service under the MCI Tariff. This being so, ATI is precluded from showing that it was

entitled to rely on MCI's word as to its right to resell the I-800 service to ATI.

VI. ATI's TORTIOUS INTERFERENCE CLAIMS

MCI next argues that ATI's tortious interference claims are barred because they are in essence claims for breach of contract. According to MCI, ATI is seeking to recover damages for MCI's breach of its duty to provide the I-800 service as promised in its contract with ATI. Although this may state a claim for breach of contract, MCI argues, it does not provide the basis for a claim sounding in tort. ATI responds that its tortious interference claims against MCI are not for conduct related to the subject matter of the contract but are instead for MCI's interference with its arrangements and contracts with its I-800 international customers and its conspiring with Telmex and the other defendants to prevent ATI from subsequently obtaining I-800 service from AT&T. As explained below, ATI's argument fails as to its claim that MCI interfered with its contractual relationship with its I-800 international customers.

In *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493 (Tex. 1991), DeLanney brought suit against Southwestern Bell alleging negligence and violation of the Texas Deceptive Trade Practices—Consumer Protection Act ("DTPA") for its failure to publish his advertisement in the Yellow Pages. The trial court granted Bell's motion for a directed verdict as to the DTPA claim, but denied it as to negligence. The jury found that Bell was negligent in omitting DeLanney's advertisement from the Yellow Pages and the trial court rendered judgment for DeLanney. Bell appealed.

On appeal, the court of appeals, with one justice concurring and one justice dissenting, affirmed. The majority of the court held that Bell's cancellation of DeLanney's advertisement was correctly submitted as a negligence claim. The dissenting justice argued that because DeLanney sought damages for

breach of a duty created under the contract, rather than a duty imposed by law, the claim sounded only in contract.

The Texas Supreme Court reversed and remanded, explaining:

> If the defendant's conduct . . . would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort. Conversely, if the defendant's conduct . . . would give rise to liability only because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds only in contract.
>
> In determining whether the plaintiff may recover on a tort theory, it is also instructive to examine the nature of the plaintiff's loss. When the only loss or damages is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract. *See* PROSSER AND KEETON AT 656; 1 J. EDGAR, JR. & J. SALES, TEXAS TORTS AND REMEDIES § 103[4][b] at 1-36 (1990). We applied this analysis in *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986), where we wrote:
>
> > The acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone.

Bell's duty to publish DeLanney's advertisement arose solely from the contract. DeLanney's damages, lost profits, were only for the economic loss caused by Bell's failure to perform. Although DeLanney pleaded his action as one in negligence, he clearly sought to recover the benefit of his bargain with Bell. We hold that Bell's failure to publish the advertisement was not a tort.

> Under our analysis in *Reed*, Delanney's claim was solely in contract.

809 S.W.2d at 494-495. Finding that DeLanney had waived any claim for breach of contract by failing to submit any contract issues to the jury, the Supreme Count reversed the judgment of the court of appeals and rendered a take nothing judgment against DeLanney.

Following the analysis used in *DeLanney*, the Court concludes that the only claim ATI could bring against MCI for not providing the I-800 service for which ATI contracted is one for breach of contract. The duty to provide the service arose from the contract and the injury for which ATI seeks damages is the economic loss it sustained as a result of MCI's failure to provide the I-800 service as provided by the contract. However, as this Court has determined prior hereto, ATI may not maintain this claim due to the cited liability provisions contained in the MCI Tariff. To the extent that ATI attempts to assert a separate claim for tortious interference based on MCI's failure to honor its contractual obligation to provide the I-800 service, the Court finds that it may not do so.[13]

However, the fact that ATI may not pursue a claim for tortious interference based on MCI's failure to provide the I-800 service as called for by the contract with ATI does not mean that ATI is barred from asserting a tortious interference claim based on MCI allegedly conspiring with Telmex and the SBC defendants to block ATI from contracting with AT&T for the I-800 service. Clearly, any actions taken by MCI to interfere with ATI's efforts to contract with AT&T would breach du-

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[13] In light of its determination that the only claim ATI may assert against MCI for failing to provide the I-800 service is one for breach of contract, the Court finds no need to address MCI's additional arguments as to why it is entitled to summary judgment with respect to ATI's tortuous interference claim.

ties independent of those imposed by its contract with ATI. Likewise, the damages which ATI might recover would be for the economic loss it suffered from not being able to obtain the I-800 service from AT&T. Therefore, to the extent that it is based on MCI allegedly preventing it from contracting with AT&T for the I-800 service, ATI may bring a claim for tortious interference.

However, ATI's success in short-lived. In order to prevail on this claim, ATI would have to show that it had the required concession from the SCT to provide the I-800 service to Mexican customers. The evidence of record, however, is that ATI never sought or obtained a concession from the SCT. Consequently, MCI is entitled to summary judgment on this tortious interference claim as well.

VII. ATI'S ANTITRUST CLAIMS

MCI moves for summary judgment as to ATI's claim for violation of the Texas Antitrust Act as being preempted by federal law. Specifically, MCI argues that ATI's allegation that MCI conspired with Telmex and the other defendants to restrain trade involving interstate and foreign commerce must be resolved under federal antitrust law. Therefore, because all the facts giving rise to ATI's claim occurred in Mexico, ATI must pursue its claim under federal law. ATI responds that the Fifth Circuit rejected this preemption argument in *Pounds Photographic Labs v. NoritsuAmerica Corp.*, 818 F.2d 1219 (5th Cir. 1987) (holding that pre-1983 Texas antitrust statutes were not preempted by the Sherman Act; Texas antitrust statutes are supplementary to the federal regulatory scheme). Moreover, ATI contends, not all the acts in furtherance of the conspiracy occurred in Mexico, some of the acts took place in the United States. Although acknowledging that federal antitrust laws do not completely preempt state laws, MCI replies that as a general rule, federal antirust laws govern interstate commerce and state antitrust laws apply to intrastate commerce. Therefore, because all the activities of which ATI

complains occurred outside the United States, the Texas Antitrust Act does not apply. Moreover, because federal antitrust laws do not reach conduct involving foreign trade or commerce, such conduct is also exempt from the Texas Antitrust Act by virtue of § 15.05(g) of the Texas Business & Commerce Code. The Court will address this last argument first.

Section 1 of the Sherman Act prohibits conspiracy "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. §1. Section 2 of the Sherman Act prohibits monopolization and attempted monopolization "of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. §2. Although the Sherman Act applies to trade and commerce with foreign nations, it applies to foreign anti-trust conduct only to the extent that said conduct produces "some substantial effect in the United States." *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796, 113 S.Ct. 2891, 2909, 125 L.Ed.2d 612 (1993); (*U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1, 4 (1st Cir. 1997). Specifically, pursuant to § 6a of the Sherman Act, anti-trust conduct involving United States export commerce with foreign nations is actionable only if said conduct has a "direct, substantial, and reasonably foreseeable" effect on one of the following: (1) on United States domestic commerce; (2) on United States import commerce; or (3) on export commerce only to the extent that such conduct injures export business in the United States. 15 U.S.C. § 6a. The limitation of § 6a applies even where the anti-trust conduct originates in the United States or involves American-owned entities operating abroad. *Eurim-Pharm GmbH v. Pfizer, Inc.*, 539 F.Supp. 1102, 1106 (S.D.N.Y. 1984).

Earlier in this case the Court dismissed ATI's claims against Telmex, finding that it lacked personal jurisdiction over Telmex. In the course of addressing the jurisdictional issue, the Court was required to determine whether ATI had

stated a claim against Telmex for violation of the Sherman Act and found that it had not, observing:

> [A]ll the activities of Telmex of which complains occurred outside the United States. Moreover, the market from which ATI alleges to have been excluded by Telmex is the I-800 service market in Mexico, outside the United States. Neither the fact that ATI is an American corporation or that SBC and MCI are American corporations provide the requisite nexus with American trade that would bring the alleged illegal activity within the purview of the Sherman Act. *See Power East Limited v. Transamerica Delaval Inc.*, 558 F.Supp. 47, 49 (S.D.N.Y. 1983) (Sherman Act claim of plaintiff, a Cyprus corporation, failed to state cause of action, where activities complained of all occurred outside United States, market from which plaintiff was supposedly excluded was outside the United States, and plaintiff made no suggestion of a "relevant market" in United States nor mentioned any American competitors; fact that principal shareholder of plaintiff was United States citizen and one of the defendants was a corporation organized within States did not provide requisite nexus with American trade that would bring alleged illegal activity within purview of Sherman. Act). *See also Optimum v. Legent Corporarion*, 926 F.Supp. 530 (W.D.Pa.1996) (holding that foreign corporation which marketed and distributed computer software products of American corporation in Argentina failed to establish that termination of its marketing contact by another foreign corporation resulted in anticompetitive effect on United States' domestic commerce, and thus district court lacked subject matter jurisdiction over corporate distributor's claim that termination of marketing contract violated Sherman Act; allegation that income flowed between corporations was insufficient to establish requisite domestic effect and distributor, a foreign corporation, could not maintain

action under Sherman Act based merely upon injury to United States exporters attempting to enter Argentine computer software market).

As observed by the Court of Appeals for the Tenth Circuit:

> The principal purposes of the antitrust laws are protection of American consumers and American export and investment opportunities. If American interests are at stake we may impose liability for conduct outside our borders that has consequences within our borders. *See Alcoa*, 148 F.2d at 443. When the contacts with the United States are few, the effects upon American commerce minimal, and the foreign elements overwhelming, however, we do not accept jurisdiction. We believe that the analysis set forth in *Timberlane Lumber Co. v. Bank of America.*, 549 F.2d at 613-15, contains the proper elements for consideration. To support jurisdiction of American court, plaintiff must first show that the challenged activity had an actual effect on United States commerce. Then we must decide if "the interest of and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Id.* at 613.

Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869 (10th Cir. 1981). In short, the antitrust laws of the United States do not regulate the competitive conditions of other nations' economies. *Matushita Electric Industrial Co., Ltd v. Zenith Radio Corporation*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.E4.2d 538 (1986). *See also Industrial Inv. Develop. Corp. v. Mitsui & Co.*, 671 F.2d 876, 883 (5th Cir. 1982) (district court should not apply the antitrust laws to foreign conduct or foreign actors if such

application would violate principles of comity, conflicts of law or international law).

In view of the fact that the conduct of Telmex all occurred in Mexico, that the market from ATI claims to have been excluded is the I-800 service in Mexico, and that the resultant economic consequences are felt predominately by Mexican consumers, the Court finds it does not have subject matter jurisdiction of ATI's antitrust claims against Telmex.

See Court's Order June 20, 1997, pages 8-10.[14]

Even though they were made in the context of deciding if Telmex was subject to the personal jurisdiction of this Court, the Count finds that these findings are also determinative of whether or not ATI has a claim against MCI under the Sherman Act. As the Court noted in the above-quoted excerpt from its previous order, the market from which ATI claims to have been excluded is the I-800 service in Mexico. Likewise, the resultant economic consequences of Telmex and the other defendants terminating ATI's I-800 service was felt predominately in Mexico by Mexican consumers. Although ATI claims that it has evidence that the actions MCI took to provide Telmex with the information it needed to terminate ATI's I-800 service occurred in the United States, the Court finds that this is not enough to maintain a claim under the Sherman Act against MCI. Likewise, the fact that MCI is an American corporation does not provide a sufficient nexus with American trade to bring the alleged illegal action of MCI within the purview of the Sherman Act. *See Power East Limited v. Transamenica Delaval Inc.*, 558 F.Supp at 49. Furthermore, ATI's assertion that the income generated by its I-800 service flowed into the United States is insufficient to establish the requisite domestic effect. *Optimum, S.A.*, 926 F.Supp. at 533 (assertion by plaintiff that the income in issue

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[14] Docket Entry No. 74.

flowed and would continue to flow between corporations located in the United States and corporations located in Argentina deemed insufficient to establish the requisite domestic effect required by § 6(a).

Accordingly, the Court finds that ATI cannot maintain its federal antitrust claims against MCI. Consequently, because the antitrust laws of Texas do not reach activities exempt from the operation of the federal antitrust laws,[15] ATI's claims against MCI for violation of the Texas antitrust laws likewise fall to MCI's summary judgment motion.

CONCLUSION

Based on the above findings, it is hereby ORDERED that MCI Telecommunications Corporation and MCI International, Inc.'s Motion for Summary Judgment be, and the same is hereby, GRANTED.

SIGNED this the 5th day of August, 1998.

/s/ D.W. Suttle
D.W. SUTTLE
Senior United States District Judge

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[15] Section 15.05 of the Texas Free Enterprise and Antitrust Act provides in pertinent part that "[n]othing in this section shall be construed to prohibit activities that are exempt from the operation of the federal antitrust laws, 15 U.S.C. Section 1 et seq." Tex. Bus. & Com. Code Ann. § 15.05(g).

APPENDIX F

[Filed Aug. 5, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil No. SA-96-CA-1064

ACCESS TELECOM, INC.,

Plaintiff,

v.

MCI TELECOMMUNICATIONS CORP., *et al.*,

Defendants.

ORDER

Pending before the Court is the Motion for Partial Summary Judgment filed by Access Telecom, Inc. ("ATI") on August 11, 1997.[1] Also before the Court are the following documents:

1. The Response filed by the defendants MCI Telecommunications Corporation and MCI International, Inc.'s ("MCI") on August 26, 1997;[2]

2. The Response filed by the defendants SBC Communications, Inc., SBC International, Inc., and SBC International Latin America, Inc. ("SBC") on September 4, 1997;[3]

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[1] Docket Entry No. 88.

[2] Docket Entry No. 106.

[3] Docket Entry No. 114.

3. ATI's Reply to SBC's Response filed by ATI on September 26, 1997.[4]

Having reviewed the same, the pleadings and applicable law, the Court enters the followings order.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Burfield v. Brown, Moore & Flint, Inc.*, 51 F.3d 583, 588 (5th Cir. 1995). A fact is "material" if its resolution in favor of one party might affect the outcome of the action under governing law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). No genuine issue of material fact exists if a rational trier of fact could not find for the nonmoving party based on the evidence presented. *National Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 712 (5th Cir. 1994).

To withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial must come forward with evidence to support the essential elements of its claim. *Id.* (citing *Celotex Corp.*, 477 U.S. at 321-323). "[A] complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323.

The Court must consider all evidence in the light most favorable to the nonmoving party. *National Ass'n of Gov't Em-*

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[4] Docket Entry No. 141.

ployees, 40 F.3d at 712-713. "Conclusory allegations unsupported by specific facts, however, will not prevent the award of summary judgment. . . ." *Id.* at 713 (quoting *Anderson*, 477 U.S. at 249).

II. CHOICE OF LAW

In its motion for partial summary judgment, ATI seeks a ruling that its contracts and activities in providing the I-800 services to its customers were legal under Mexican and United States laws. It also seeks a ruling that the acts of Telmex and MCI in disconnecting its I-800 service were illegal under Mexican law. SBC and MCI maintain that ATI's I-800 service was illegal under Mexican law and that Telmex's disconnection of ATI's I-800 service was legal under Mexican law.

As the parties recognize, Federal Rule of Civil Procedure 44.1 governs the procedure for determining an issue of foreign law. Rule 44.1 states:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including, testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Fed.R.Civ.P. 44.1. ATI provided the requisite notice of its intent to raise an issue concerning the law of a foreign county in a pleading entitled "Notice of Intent to Rely Upon Foreign Law."[5]

ATI asserts that the Court must apply Texas law in determining the legality of its contracts with its customers because

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[5] Docket Entry No. 90.

those contracts contain choice of law provisions which provide that the contract will be governed by the laws of Texas. SBC and MCI, while acknowledging the choice of laws provision, contend that Texas law should not be applied because to do so would be contrary to the fundamental policy of Mexico against resale of the I-800 service.

When parties to a contract reside or expect to perform their respective obligations in multiple jurisdictions, they may be uncertain as to what jurisdiction's law will govern construction and enforcement of the contract. To avoid this uncertainty, they may express in their agreement their own choice that the law of a specified jurisdiction apply to their agreement. Judicial respect for their choice advances the policy of protecting their expectations. This conflict of law concept is commonly referred to as party autonomy. *See* R. Weintraub, Commentary on the Conflict of Laws 269-271 (1971) ["Weintraub"].

Under the concept of "party autonomy," Texas courts respect the parties' choice of law unless the chosen law has no relation to the parties or the agreement, or their choice would offend the public policy of the states whose laws otherwise ought to apply. *Salazar v. Coastal Corp.*, 928 S.W.2d 162, 166 (Tex.App.—Houston [14th Dist.] 1996, no writ history) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990), *cert. denied*, 498 U.S. 1048, 111 S.Ct. 755, 112 L.Ed.2d 775 (1991); *First Commerce Realty Investors v. K-F Land Co.*, 617 S.W.2d 806, 808-09 (Tex.Civ.App.—Houston [14thDist.], writ ref'd n.r.e.)). The party autonomy rule is codified in Texas in the Texas Business & Commerce Code, which provides:

> [W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or such other state or nation shall govern their rights and duties.

TEX.BUS. & COM.CODE Ann. §1.105(a) (Vernon Supp. 1989).

Texas has adopted Section 187 of the Restatement (Second) of Conflict of laws concerning contractual choice of law provisions. *DeSantis*, 793 S.W.2d at 677. Section 187 states:

> Law of the States Chosen by the Parties
>
> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

The issue before the Court—whether or not ATI's I-800 service was legal—is not "one which the parties could have resolved by an explicit provision in their agreement." Therefore, the Court must apply § 187(2).

As noted, ATI and its customers chose the law of Texas to govern their contracts. However, Texas does not have a significant relationship to the parties. All of ATI's customers were in Mexico and the contracts were negotiated in Mexico. Moreover, the international long distance calls originated from Mexico. Thus, the Court finds that Mexican law should apply. Even if Texas were found to have a substantial relationship to ATI and its customers, the Court finds that the exception contained in § 187(2)(b) applies. Whether the exception of § 187(2)(b) applies depends upon three determinations: First, whether there is a state the law of which would apply under § 188 of the RESTATEMENT absent an effective choice of law by the parties, or in other words, whether a state has a more significant relationship with the parties and their transaction than the state they chose; second, whether that state has a materially greater interest than the chosen state in deciding whether the agreement should be enforced; and third, whether that state's fundamental policy would be contravened by the application of the law of the chosen state. *De Santis*, 793 S.W.2d at 678. More particularly, the Court must determine: first, whether Texas has a more significant relationship to these parties and their transaction than Mexico; second, whether Texas has a materially greater interest than Mexico in deciding the legality of the 1-800 service provided by ATI to its customers; and third, whether the application of Texas law in this case would be contrary to the fundamental policy of Mexico.

Section 188 of the RESTATEMENT provides that a contract is to be governed by the law of the state that "has the most significant relationship to the transaction and the parties," taking into account various contacts in light of the basic conflict of laws principles of section 6 of the RESTATEMENT. In the instant case, that country is Mexico. As previously noted, the contracts between ATI and its customers were negotiated and entered into in Mexico. The service was provided by ATI in Mexico. The customers of ATI

were in Mexico. The place where ATI's I-800 service was blocked was Mexico. The customers of ATI were hurt in Mexico. Thus, it is Mexico, not Texas, which has an interest in protecting ATI's customers in Mexico. Finally, it is Mexico that has a strong public policy interest in its own telecommunication industry.

III. RULE 44.1

In determining Mexican law the Court is not bound by the evidence presented by the parties or by the Federal Rules of Evidence. Under Rule 44.1 "[t]he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The Court's determination shall be treated as a ruling on a question of law." As recently explained by one district court,

> Rule [44.1] permits the court to consider any material that is relevant to a foreign-law issue, whether submitted by counsel or unearthed by the court's own research, and without regard to its admissibility under the rules of evidence.
>
> * * * *
>
> Since the new Rule dissipates former inhibitions, the court may consider any material the parties wish to present. Statutes, administrative material, and judicial decisions can be established most easily by introducing an official or authenticated copy of the applicable provisions or court reports supported by expert testimony as to their meaning . . . In addition to primary materials and expert testimony, a litigant may present any other information concerning foreign law he believes will further his cause, including secondary sources such as texts, learned journals, and a wide variety of unauthenticated documents relating to foreign law.

Arthur R. Miller, "Federal Rule 44.1 and the 'Facet' Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine," *65 Mich. L.R.* 613, 656-57 (1967) (footnotes omitted). *See also Atwood Turnkey Drilling v. Petroleo Brasileiro, S.A.*, 785 F.2d 1174, 1175 (5th Cir. 1989), *cert. denied*, 493 U.S. 1075, 110 S.Ct. 1124, 107 L.Ed.2d 1030 (1990); *Republic of Turkey v. OKS Partners*, 146 F.R.D. 24, 27 (D.Mass. 1993).

Under Rule 44.1 expert testimony accompanied by extracts from foreign legal material is the basic method by which foreign law is determined. *Republic of Turkey*, 146 F.R.D. at 27 (citing cases); 9 C. Wright & A. Miller, *Fed. Prac. & Proc.* § 2444, at p. 646. An expert witness on foreign law is not required to meet any special qualifications and need not be admitted to practice in the country whose law is at issue. *See* 9 C. Wright & A. Miller, *supra*, at p. 646. Differences of opinion among experts on the content, applicability, or interpretation of foreign law do not create a genuine issue as to any material fact under Rule 56. *Banco de Credito Indus., S.A. v. Tesorreria General*, 990 F.2d 827, 838 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071, 114 S.Ct. 877, 127 L.Ed.2d 73 (1994); John R. Brown, "44.1 Ways to Prove Foreign Law," 9 *Mar. Law.* 179, 194 (1984).

Although expert testimony is the most common way to determine foreign law, it is no longer "an invariable necessity in establishing foreign law and indeed, federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities." *Curtis v. Beatrice Foods Co.*, 481 F.Supp. 1275, 1285 (S.D.N.Y.), *aff'd mem.*, 633 F.2d 203 (2d Cir. 1980) (citing Pollack, "Proof of Foreign Law," 26 *Am. J. of Comparative L.* 470, 474 (1978) (listing au-

thorities)). The Advisory Committee Notes to Rule 44.1 state that the Rule

> provides that in determining [foreign] law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.

Rule 44.1, Advisory Committee Notes. *See also* 9 C. Wright & A. Miller, *supra*, at p. 646. In making its determination of foreign law the court may rely on foreign case law decisions, treatises, and learned articles, even if they are not generally admissible under the Federal Rules of Evidence. *Republic of Turkey*, 146 F.R.D. at 27 (citing cases).

Arbitration Between Trans Chem. Ltd. and China National Machinery Import and Export Corp., 978 F.Supp. 266, 275-76 (S.D.Tex 1997).

IV. Undisputed Facts

The undisputed facts show that on March 10, 1976, the Mexican federal government, via the Office of the Secretary of Communications and Transportation ("SCT"), granted Telmex an exclusive concession, effective for 30 years, for building, operating and exploiting a public telephone service network for Mexico. In 1990, the SCT modified that concession to give Telmex an exclusive concession for 50 years, beginning March 10, 1976.[6] That concession provides that a

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[6] *See* Amendment to the Concession of Telefonos, de Mexico, S.A. De C.V., attached as Tab F-5 to the Appendix to MCI's Motion for Summary Judgment.

"subscriber" is "a user who has entered into a contract with Telmex for the use of any telecommunication service."[7] A "user", in turn, is defined as "an individual or corporation with temporary or permanent access to a public or private telecommunication service."[8] Under the concession, Telmex was required to sign a service contract with all its users which established the general service terms for the provision of services.[9] During the first six years of the concession, the termination of which was August 10, 1996, Telmex was not obliged to permit its users to resell "express circuit capacity" to provide basic long distance telephone service.[10] Meanwhile, the General Means of Communications Law[11] required anyone wishing to "exploit general routes of communications or any type of connected service" to obtain a concession or permit from the SCT.[12] Neither a "general route" nor its connected services could be exploited without authorization by the SCT pursuant to regulatory provisions.[13] Entities rendering telecommunication services are defined in Art. V of the Reglamentos (Telecommunications Rulings) as "[i]ndividuals or corporations rendering telecommunications services holding a concession to install, operate and exploit a telecommunications network or having a permit to render telecommunications services using the networks given in concession to third parties."[14] Furthermore, the concession to exploit the

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[7] *Id.*, Art. 1-1, Definition of Terms.

[8] *Id.*

[9] *Id.*, Art. 4-10.

[10] *Id.*, Art. 5-7.

[11] *See* Tab 3A of the Appendix attached to SBC's Response (Docket Entry No. 114).

[12] *Id.*, Art. 8.

[13] *Id.*, Art. 48.

[14] *See* Telecommunications Rulings of the Ministry of Communications and Transport, Art. V, attached as Tab 3B in the Appendix to SBC's

network had to be carried out directly by its holder (Telmex) and its "commercialization" could be made through agents only in accordance with provisions approved by the SCT.[15]

On June 1, 1993, ATI entered into a contract with MCI for the provision of international 800 ("I-800") long distance service from Mexico to the United States for itself and as agent for various customers in Mexico.[16] In 1994, Telmex disconnected ATI's I-800 service as being an illegal resale of the I-800 service in violation of the concession granted to Telmex. In the instant motion for partial summary judgment, ATI argues that its service was legal and that Telmex had no right to disconnect it. Naturally, SBC and MCI counter that ATI's resell of the I-800 service was illegal under Mexican law. Both sides have proffered the affidavits of experts in support of their respective positions.

V. ATI's Experts

Brad Tirpak

Brad Tirpak, the president and sole stockholder of ATI, avers as follows in his affidavit:

1. "Access Telecom, Inc. ("ATI") offered a calling card service to customers in Mexico. It is very similar (sic) the calling card services offered by MCI and other US Telecommunications providers in Mexico. The customer picked up the phone in Mexico and dialed an 800 number. A voice prompt or live operator asked the customer for a billing code and the number the customer wished to dial. The operator or computer, completed the call to its final destination. MCI

Response.

[15] *Id.*, Art 75.

[16] MCI had earlier contracted with Telmex for the provision of the I-800 service.

offered and still offers this exact same service to customers in Mexico.

2. This service is not what is known as "call back" in the telecommunications industry.

* * * *

8. While creating Access Telecom and throughout the course of doing business, I extensively researched United States and Mexican Law and Regulations concerning International 800 service and calling card services that ATI provided to its customers.
9. I consulted numerous legal experts about it (sic) legality to insure that no authority existed which prohibited the type of service offered by ATI
10. I personally consulted with US attorneys including John Wyss at Wiley Rein and Felding. I consulted Mexican attorneys including Santiago Corcuera at the firm of Kuri, Brena, Sanchez and Corcuera.
11. I also consulted numerous people at the Federal Communications Commission. These people included Fran Eisenstein and Diane Cornell, who was then the Director of the International Common Carrier Bureau at the FCC.
12. I consulted Mexican Authorities at the Secretariat of Telecommunications and Transport including Mr. Alvarez Alonso, the director of Public Policy. Mr. Alvarez Alonso stated to me in a letter that the service ATI provided was legal under Mexican law. His predecessor, Mr. Jose Maria Rivas, the director of policy at the Mexican authority also stated to me in person on three separate occasions that ATI's services did not violate Mexican law.
13. I read the Mexican Telecommunications law on this subject.
14. It is my opinion, based on the extensive research that I have done, and the opinions presented to me from

Mexican authorities, that the services ATI provided did not violate Mexican or United States Law.

* * * *

See Affidavit of Bradley Tirpak, attached as Tab B to the Appendix to ATI's Motion.

Miguel Orrico Alarcon

Miguel Orrico Alarcon, an attorney in Mexico,[17] avers the following in his affidavit:

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[17] Mr. Alarcon's credentials, as set forth in his Curriculum Vitae, are as follows:

PROFESSIONAL DEGREES:

1. Attorney—National University of Mexico.
2. Legal Counselor for the Japanese Embassy in Mexico.
3. Legal Counselor for private corporations.
4. Legal Counselor and associate to Public Notary 117 of the Federal District. Lic. Horacio Alemant.

BOOKS AND PUBLISHED WORKS

1. Transports and Communications Under Mexican Law
2. The Legislation of Communications and Transports
3. General Aspects on Franchises and Permits on Communications and Transports
4. The Mexican Position at COPOUS—Space Journal

DISTINCTIONS

Public Administration Award on Communications and Transports—1980

OFFICIAL ACTIVITIES

1. Attorney for the Ministry of Agriculture and Coordinator of Legal Matters with F.A.O. (Food and Agriculture Organization, UN).
2. Technical Adviser of the Agrarian Ministry.
3. Head of Legal Consultation and Legislation Department—Ministry of Communications and Transport.
4. Head of the Litigation Department. Ministry of Communications and Transports.
5. Legal Counselor of Pacific Railroad Co.
6. Delegate of the Ministry of Communications to the Commission of Legal Regulations for the Public Sector.

2. I have many years experience as an attorney in the area of telecommunications industry in Mexico. I re-

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7. Delegate of the Federal Government for the requisition of the Port of Veracruz, Telefonos de Mexico, Mexicana de Aviacion and other institutions and corporations.
8. Director General of the Consultation and Technical Commission of the Ministry of Communications and Transports.

INTERNATIONAL LEGAL ACTIVITIES

1. Representative of the Ministry of Communications to the Tripartite International Commission for Drug Control Mexico—U.S.A.—Canada.
2. Head of the Mexican Delegation to the 10th Conference on Interior Transports and Railroad Works of O.I.T. with residence in Geneva, Switzerland.
3. Ex Officio Representative of the Mexican Delegation to the International Astronautical Federation.
4. Full Member of the International Academy of Astronautics.
5. Member of the Board of Trustees, Law Section, International Academy of Astronautics.
6. Legal Counselor to the Mexican Permanent Diplomatic Missions at United Nations in Geneva and New York on outer space matters (U.N.).
7. Official Mexican Delegate to the Legal Sub-Committee of the Commission for the Peaceful Use for Outer Space of the United Nations (COPUOS).
8. Vice-President International Astronautical Federation.
9. I.A.F. Delegate and Observer to the International Telecommunications Union (ITU).
10. Legal Counselor for the Mexican Government to the Latin America Space Conference (Santiago de Chile 1994—Punta del Este, Uruguay 1996).

EDUCATIONAL ACTIVITIES

1. Professor of Mercantile Law—University Valle de Mexico.
2. Lecturer on Criminal Law on Communications and Transports at the Institute of the Federal Attorney's General Office.
3. Lecturer on Communications and Transport Law at the Mexican National University Division of Superior Law Studies and Doctorate.
4. Full Member of the College of Professors of Aeronautics and Outer Space Law, Mexican National University.

ceived my legal degree from the University of Mexico. . . . I have served in many capacities, including the Mexican Telecommnunications Industry, and have served in numerous positions which required my expertise in the context of comparative law issues and the application of Mexican Law to the International Communications Industry. During the course of my career, in both my official activities, my private activities and in my international legal activities, I have been required to research and apply Mexican and American Telecommunications Law to issues pertaining to the telecommunications industry in Mexico and internationally. This was particularly important in my position as Head of the Consultation and Litigation Department for the Ministry of Communications and Transport, my position as Sub-Director General of Legal Matters for the Ministry of Communications and Transport, and as Legal Counsel for Pacific Railroad Company, and as Delegate of the Ministry of Communications to the Commission of Legal Regulations for the Public Sector. The Ministry of Communications and Transports ("SCT") is the American equivalent of the Federal Communications Commission. I basically head the part of the agency which deals with legal and legislative issues in the telecommunications industry.

3. I have reviewed Plaintiff's pleadings along with the responsive pleadings filed by the Defendants in this cause, and the contract documents pertaining to the services offered by Access Telecom, Inc. including ATI's contracts with its customers and the MCI-ATI contracts. I have also thoroughly discussed the facts on this case with counsel for ATI, Mr. McCormick. Access Telecom, Inc. ("ATI") provides telecommunication services to its customers for telephone calls to and from Mexico and to the rest of the world.

Telefonos de Mexico, S.A. de C.V. ("Telmex") is a Mexican corporation which provides and markets telephone services to certain international providers including MCI International, Inc. My review of the documents in this case, including pleadings, contracts and related documents, establishes that during 1993 and 1994, ATI contracted with MCI Telecommunications Corporation for I-800 service from Mexico for itself and as agent for various customers in Texas and elsewhere in the United States. In addition to the I-800 service from Mexico, ATI offered a switching service carried out in Texas and elsewhere in the United States whereby ATI's customers could complete calls to a variety of U.S. 800 and other telephone numbers from Mexico. From 1993 through 1995 ATI performed certain telecommunication services consisting basically of terminating international calls in the United States, originating in Mexico, with the following conditions:

(a) the calls were carried through the concessionaire of long distance in Mexico Telefonos de Mexico ("Telmex"), using the switching service of 800 International Numbers;

(b) these calls were delivered by the Mexican long distance concessionaire (Telmex) to a contract interconnector in the United States of America, in this case MCI Telecommunication Corp. ("MCI"), and then from MCI to independent long distance service providers in the United States such as ATI and LDI;

(c) the interconnecting long distance company in the United States, through a contract with ATI, delivered the traffic to ATI with the purpose of providing call service and, eventually, terminating the call, without disconnecting either the American

carrier or the Mexican concessionaire of long distance.

4. These activities were not illegal or unlawful under Mexican law.

5. The services offered by ATI, including its contract with its agreement with its customers to provide the I-800 services to and from Mexico, violated no statute, regulation, or other legal authority. In Mexico, these activities were not specifically prohibited by law, regulation or statute, therefore they were not illegal and any person could perform such activities without being subjected to any type of sanctions or penalties imposed by law or Government. Furthermore, any attempt by Telmex or any public agency or entity to unilaterally cancel and/or disconnect this I-800 service is illegal under Mexican Law, and such action would violate the terms established in the provisions of Articles 62 and 63 of the "Ley de Vias Generales de Comunicacion" (Federal Communications and Transports Act), that the concessionaires cannot refuse to provide the service or alter the order to that effect. These articles read as follows:[18]

* * * *

It would also violate Article 78 of the "Reglamento de Telecommunicaciones" (Telecommunications Regulations Act), that established that all services must be provided to any person that demands it without privilege or distinction.

* * * *

Such action would also violate Article 84 of these Regulations, because Telmex has to comply with the terms of the contracts, which means, that he (sic) can

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[18] Throughout his affidavit Alarcon set out the referenced Articles in Spanish but failed to provide their English translation.

only interrupt or cancel the services within the terms of such contracts or when the Ministry of Communications orders it based on legal regulations.

* * * *

Additionally this action violates clauses 4-2, 4-10, and 5-5 of the Telmex concession. I have fully reviewed the Telmex tariffs and concessions and I have seen nothing in the tariff that prohibits the resell of Telmex service. In fact the Telmex concession in effect during 1994 specifically grants Telmex the rights to sell off its excess telephone capacity.

6. Under the Mexican Constitutions and the individual guarantees specified therein, the Federal Government can only do what is ordered of it or what is specifically allowed to do under the specific and various laws of the country of Mexico, in terms of governing it inhabitants. It is a basic tenet of Mexican Law that one can do anything that is not prohibited by law, regulation or similar legal directive. A foreign person or corporation doing business in Mexico also has the same rights that the Constitution grants to its citizens. The Constitution applies to anybody who is being governed, including foreign corporations doing business in Mexico like ATI. ATI's interconnection agreement with MCI was valid and not illegal in Mexico as it is 1-800 service. Further, Telmex, during the time in question (1992-1995) and at the present time, had no legal authority to determine the form in which the calls were terminated in the United States. Mexican laws have no extraterritorial application. In this case, Telmex was the sole carrier of the traffic in Mexico and ATI did not provide any telephone services in Mexico in terms of the Law.

* * * *

8. I am professionally and personally acquainted with Jose Mena Rivas Moncayo who is the commercial Director of Satellite Services of Telecommunication in Mexico. Mr. Rivas is an actuary (mathematician) and has no legal training.

9. Any conclusion by any person or entity, to the effect that the services offered by ATI were illegal in Mexico, has no foundation or basis under Mexican law.

See Declaration of Miguel Orrico Alarcon, attached as Tab C to the Appendix to ATI's motion.

In a supplemental declaration, Alarcon further states:

4. The purpose of this Supplemental Declaration is to explain more thoroughly the facts and opinions expressed by me in my original declaration pertaining to my opinion concerning the activities and telecommunication services undertaken in this action by the Plaintiff, Access Telecom, Inc., these activities were not unlawful or of an illegal nature in the period from January 1, 1993 to December 31, 1994. These activities were activities with respect to which there were no legal provisions whatsoever that prohibited them.

5. No legal provisions whatsoever prohibited ATI's activities. They were not subject to the compliance of certain requirements, whether they were of a regulatory nature or of any other nature, and therefore such activities could not be penalized because there were no legal provisions that could be infringed. The unilateral decision of Telefonos de Mexico, S.A. de C.V. of canceling the telephone numbers subject matter of this controversy is an illegal act by this company and without any legal basis, which are previously indicated, infringes not only provisions in the Law of General Communication Ways and the Telecommunication Regulations (Ley de Vias Generales de

Comunicacion and Reglamento de Telecomunicaciones) but also obligations in the Concession Title granted by the Mexican government for provision and exploitation of telephone services.

6. Prior to my original declaration dated August 11, 1997, and this Supplemental Declaration in this cause, I reviewed the pleadings in this cause, including Plaintiff's Original and Amended Complaints, Defendants' Answers, MCI's Motions to Dismiss and Responses, MCI's Summary Judgment documents and exhibits including supporting declaration and attachments, and summary judgment documents and exhibits of ATI. These documents included contracts between Telefonos de Mexico and MCI and between MCI and ATI pertaining to the services offered by ATI, and the Telefonos de Mexico Concession in effect in 1993 and 1994.

7. The facts upon which I relied in rendering my opinion concerning the type of service offered by ATI, are those set forth in my declaration dated August 11, 1997 (Exhibit "2") to ATI's Motion for Summary Judgment. The other facts upon which I relied in rendering my opinion include the facts obtained from personal review of documents including the aforementioned contract documents, pleadings and exhibits, the documents attached to this Supplemental Declaration, as well as the pertinent legal authorities, and all other facts set forth in my Original and Supplemental Declarations.

8. I have also reviewed SCT communications authored by Luis Miguel Alvarez Alonso, dated February 2, 1996 and all attachments thereto, letter of June 6, 1996 from Luis Miguel Alvarez Alonso to Directores Generales de Centros S.Ct; Communications from Luis Miguel Alvarez Alonso dated September 10,

1996 to C. Juarez Cuarto; letter dated October 4, 1993 from Jose Maria Rivas Moncayo to Santiago Gutierrez; letter dated October 4, 1993 from Jose Maria Rivas Moncayo to Carlos Rivera Lopez, MCI representative, a true copy of these communications are attached to this supplemental declaration as Exhibits 1-5.

9. The letter of February 2, 1996 (Exhibit 1) issued by Mr. Luis Miguel Alvarez Alonso, specifically states that according to the Law of General Communications Ways (Ley de Vias Generales de Comunicacion), and the Telecommunications Regulations (Reglamento de Telecomunicaciones), that were in effect in 1994, Telmex could not interrupt, suspend or cancel the telephone service to the users, except in the case of lack of payment or when the clauses established in contract to that effect are violated, therefore the unilateral acts of Telefonos de Mexico, S.A. de C.V. to cancel the service was in direct violation of Law, and concession of this corporation.

10. The letter of June 12, 1996 (Exhibit 2) is an internal document of the Ministry of Communications, where they make reference to a system known as "call back". This is not a legal term, is not legally motivated and is not duly supported in law. It only establishes that according to the new Telecommunications Law, in effect since June 7, 1995, this type of services are subjected to a permit and fulfillment of requisites.

11. It has been alleged that the services rendered by Access Telecom, Inc. were illegal, because this company did not have any permit, license or any other type or (sic) governmental authorization, and on the other hand, they were compelled to prohibit and disconnect the telephone numbers in question, by virtue

of the Resolution or Decree issued by the Secretariat of Communications and Transport declaring that services rendered by Plaintiff were illegal and did not have a legal authorization in the terms of the Mexican legislation. Supporting that argument were Official Communication No. 110-3229 dated October 4, 1993, issued by Mr. Jose Maria Rivas Moncayo, General Director of Communication Policies and Standards (Attached hereto as Exhibit 6), whereby such officer indicated that "call back" services were an illegal practice in Mexico during this time and infringed the exclusivity provisions agreed upon by the Federal Government with Telefonos de Mexico, S.A. de C.V. However, no one other than ATI seems to address the fact that Access Telecom, Inc. was not using a call back system but had contracted through MCI for the use of Telmex excess capacity as specifically authorized in the concession.

12. I have analyzed the legality issue as well as the authority of SCT to issue any "order or decree" purporting to determine an issue of application of Mexican law.

13. According to the legal principles of Mexican statutory law and principles of legality that prevail in the Mexican case law of the Supreme Court of Justice of the Nation herein transcribed, the authorities can only act or do those things expressly authorized by law whereas an individual can do anything not forbidden by law.

14. AUTHORITIES, POWERS AND LEGAL CAPACITIES OF AUTHORITIES. Authorities can only act according to the law. VOLUME CV, page 269, Blanco Perez Mata. July 10, 1950. Four votes. Jurisdictional level: First courtroom. Source: Federal Ju-

dicial Weekly (Semanario Judicial de la Federacion), 5th Period. Volume CV. Page 269 Code: Thesis.

15. ADMINISTRATIVE LITIGATION, POWERS AND LEGAL CAPACITIES OF AUTHORITIES MUST BE EXPRESSLY SET FORTH IN THE LAW. In agreement with the principles of law that prevail in our judicial system, authorities can only act according to the law. This is in contrast with the powers and authorities of individuals who can do everything not forbidden by law. Since the authority that issues such act intends to base its contents in Article 36 of the Federal Fiscal Code (Codigo Fiscal de la Federacion), interpreted a contrario sensu, and has issued an annulling decision, thus derogating its resolution that denied the reimbursement of value added differences, and such legal provision does not confer expressly to such authority the power and capacity that has assumed to proceed to the annulment of the decision challenged in the proceeding for annulment, it unquestionably violates civil rights and infringes upon the above mentioned principle of legality.

16. FIRST THREE JUDGE COURT IN THE EIGHTH CIRCUIT. Direct Amparo 83/92. Tiendas de Descuento del Nazas, S.A. de C.V. April 9, 1992. Unanimous vote. Jurisdictional level: Three Judge Circuit courts. Source: Gazette of the Federal Judicial Weekly (Gaceta del Semanario Judicial de la Federacion). 8th period, Number 54, June, 1992. Page: 67 Code: VIII. 1st Thesis J/6.

17. ADMINISTRATIVE AUTHORITIES, POWERS AND LEGAL CAPACITIES OF ADMINISTRATIVE AUTHORITIES. Administrative authorities do not have any more powers and legal capacities than those expressly granted by the law, and should they issue some determination not duly based in some

law, it should be considered as expressly granted by the law, and should they issue some determination not duly based in some law, it should be considered as infringing the rights in Article 15 in the Constitution. VOLUME LXXX, Page 4655. Leal Jose Maria and joint agents. June 30, 1944. Four votes. Jurisdictional level: Second Courtroom. Source: Federal Judicial Weekly (Semanario Judicial de la Federacion). 5th Period. Volume LXXX. Page 4655. Code: Thesis.

18. In agreement with the above mentioned principles, in this case this is an official document where an officer (as an authority) from the Secretariat of Communications and Transport of Mexico, declares and considers illegal (a priori) the activities carried out by the plaintiff company. Such declaration does not have any legal basis whatsoever, since according to the Internal Regulations of the Secretariat of Communications and Transport, such officer is not expressly authorized or has any legal capacity to do that, since it is well known and has been exhaustively analyzed in the Mexican legislation that only the Courts of Law, in this case the Federal Courts, can issue a resolution to decide on the legality or illegality of acts, behaviors or activities. It is obvious that this officer does not have any authority nor current legitimacy to issue a general and compulsory declaration or statement that involves the appropriation of powers and authorities which are exclusive of the Federal Courts, and therefore it is affected since its origin is unconstitutionality because it violates provisions in Articles 14 and 16 in the Constitution. It is an authority without legal competence or authority to issue such Declaration according to law.

19. The above mentioned Internal Regulations of the Secretariat of Communications and Transport is the legal instrument that assigns and grants the powers and authorities of the administrative units and their officers for the procedures and solution of all matters that concern such Secretariat.

20. Moreover, and according to the Internal Regulations of the Secretariat of Communications and Transport, the General Bureau of Judicial Matters (Direcion General de Asunto Juridicos) through its General Director, is the only agency of such Secretariat that according to the law has powers and authorities to issue, establish and systematize the legal criteria for the adequate application of the legal and regulatory provisions that concern the Secretariat of Communications and Transport and to prepare the drafts of agreements, decrees, circular letters and other provisions of a general nature of other administrative units of the agency or government owned entities by sector.

21. It is easy to see that neither the General Bureau of Communication Policies and Standards nor, Mr. Jose Maria Rivas Moncayo had the powers and authorities to issue the official communication being analyzed.

22. In any case, such official communication only contains a declaration by an administrative authority, that does not imply in any manner whatsoever an amendment to the existing rights or situations, as set forth by case law of the Supreme Court of Justice of the nation herein transcribed:

DECLARATIVE ACTS. It must be understood that declarative acts are those limited to evidence a certain legal situation, but which do not imply any amendment whatsoever to existing rights or situa-

tions. Fifth Period, Volume LIV, Page 5500. Luengas Luis G. Testamentary proceedings and joint agents. Thesis related to case law 17/85. Jurisdictional level: Second Courtroom. Source: Federal Judicial Weekly. Fifth Period. Volume: LIV. Page: 500.

23. Likewise, such official communications does not set forth the legal provisions on which such authority bases its argument to evaluate such activities as illegal, just indicating that it violates the exclusivity provisions agreed upon by the Federal Government with Telefonos de Mexico, S.A. de C.V., omitting to duly support and base such argument, since it does not indicate the clauses which would be violated and the reasons why, and consequently, the infringed legal provisions. Therefore, also rights in Articles 14 and 16 in the Constitution are violated because there are no elements for a due legal process because of lack of basis and support where the affected company is given the opportunity of being heard, thus being in a state of defenselessness.

ART. 14. Laws shall not have any retroactive effect to the detriment of any person whatsoever. *Nobody can be deprived of* life, freedom or of any property, possessions or rights, without a trial before courts previously established, where essential formalities of proceedings are complied with and according to laws enacted before such act. In criminal trials it is forbidden to impose, by pure analogy and even by general consensus any penalty which has not been decreed by a law precisely applicable to the crime in question. In civil trials, the final sentence must be to the letter of or according to the juridical interpretation of the law, and in the absence of the law, it shall be based on general principles of law.

ART. 16. *Nobody can be bothered personally or its family, residence, documents or possession, except by written order from the competent authority, who shall base and support the legal causes of such proceedings.* Only judicial authorities may issue a warrant of arrest, without having first an accusation or complaint about a certain fact punished by the law.

24. It is necessary to emphasize the possible liability incurred by such officer when he limits himself only to indicate to third parties his disapproval so that they have such activities as well as the services they were rendering. Actually, authorities from the Secretariat of Communications and Transport must act and proceed according to the law as soon as they have knowledge of the existence of violations to the Law of General Communications Ways or to the Telecommunications Regulations, and proceed to order a hearing including the affected parties, followed by *the immediate suspension of services* and issuing of the pertinent resolutions and penalties set forth in the law. In this case such official communication does not include any order, since there was no infringement of any legal provision and therefore the order was merely a communication that lacked legal value and relevance.

25. Based upon the facts and authorities discussed above, the activities and services carried out by Access Telecom, Inc., in no manner whatsoever are required or subject to the prior existence of a permit, license or any other type of governmental authorization, since as I have repeatedly pointed out, such activities were not forbidden, contemplated or regulated in any manner in the legislation on telecommunications in force in 1993 and 1994, and therefore, they can not

be considered as illegal or contrary to public policy in Mexico.

26. The unilateral cancellation by Telefonos de Mexico, S.A. de C.V. of previously contracted telephone lines, numbers and services was illegal since such cancellation may only be carried out if terms and conditions in the contracts executed by Telefonos de Mexico, S.A. de C.V. are infringed, provided such contract expressly authorizes it or if there are direct orders from the Secretariat of Communications and Transport for such purposes. The fact that the company was the exclusive licensee to operate telephone services in Mexico, in no manner whatsoever authorizes it to take justice into its own hands to apply measures and penalties which are of the exclusive competence of the pertaining authorities. Moreover, such acts violate several provisions, both in the Law of General Communication Ways and in the Telecommunication Regulations and also in the license or concession granted to the company.

27. Finally, it is necessary to point out that in no manner whatsoever could the Secretariat of Communications and Transport or Telefonos de Mexico, S.A. de C.V., try to impose rules, conditions or obligations with respect to activities carried out by a foreign company in another country, since this would be exerting extraterritorial effects that Mexican legislation does not allow, thus infringing the sovereignty and jurisdiction of laws and authorities in other country.

28. "Call-Back" is not contemplated or mentioned or defined in any law, statute or regulation in Mexico.

29. It should also be mentioned that the Telecommunications Regulations, in Article 75, which were in effect until June 7, 1995, clearly point out and authorize the marketing of telecommunication services through

commercial agents, that is, that even assuming without admitting the activities carried out by Access Telecom, Inc. were rendered in Mexico, we would not be facing illegal or illicit acts, since such Regulations expressly authorized the above mentioned marketing.

30. I have reviewed the Declaration of Mr. Francisco Manzanero together with the curriculum vitae he provided. I note that Mr. Manzanero indicates in his curriculum no experience in Telecommunications Law except for an article commenting on the New Telecommunications Law in 1996 published in the Law Review Magazine. The fact is that the events on which this lawsuit is based occurred in 1993 and 1994 when the old Ley de Vias Generals de Comunicacion (Law of General Communication Ways) and Reglamento de Telecomunicaciones (Telecommunication Regulations) were in full effect, not the new law effective in 1996 which appears to have been the subject of study by Mr. Manzanero. His vitae reflects that this is his only expertise and experience in Telecommunications Law, which has no application to issues in this case.

31. Finally, Telefonos de Mexico was legally authorized in Paragraph 5.7 of the Concession applicable during 1993 and 1994 from the Government of Mexico to contract away its exclusive rights and has done so in its contract with MCI to allow resale of use of Telefonos de Mexico lines and 95-800 telephone privileges in Mexico.

* * * *

See Supplemental Declaration of Miguel Orrico Alarcon, attached as Ex. A to ATI's Reply to MCI's Response to ATI's Motion for Partial Summary Judgment (Docket Entry No. 141) (emphasis in original).

Ronald T. Luke

Ronald T. Luke, a Texas attorney, states as follows in his declaration:

* * * *

2. My opinions are based upon the pleadings, discovery, documents and depositions provided to me and upon the Plaintiff's Motion for Partial Summary Judgment including Declaration and exhibits attached thereto as well as discussions with counsel and the Supplemental Declaration of Miguel Orrico Alarcon ("Orrico").

3. The following statements summarize the facts and assumptions upon which my opinions are based:

   a. Telefonos de Mexico, S.A. de C.V. ("Telmex") was until January 1997 the only company offering general public telephone services in Mexico. Until 1989 Telmex was owned by the Government of Mexico. In December 1990, the Government of Mexico sold a controlling interest in Telmex to a private consortium consisting of Grupo Carso, S.A., SBC, INC. and France Telecom. The terms of the sale are found in a franchise agreement from the Mexican Government. The rights, privileges and obligations of Telmex are set out in its Concession from the Mexican Government. . . .

   b. Section 5.7 of the Concession clearly allows Telmex to sell excess capacity to other providers of telephone services. Therefore, Telmex had the legal power to enter into contracts allowing other telephone service providers to use and resell the use of its facilities from the effective date of the Concession. . . .

   c. The Concession further states that Telmex is not obligated to enter into contracts allowing other

telephone service providers to use and resell the use of its facilities until August 10, 1996. This provision of the Concession, along with the provisions of the General Telecommunications Law gave Telmex a legal monopoly on the provision of telephone services in Mexico until August 10, 1996. . . .

d. Until January 1, 1997, the General Telecommunications Law of Mexico prohibited anyone from selling customers in Mexico telephone services in Mexico other than through facilities owned by Telmex. The law gave Telmex a physical monopoly on facilities for general public telephone services in Mexico until January 1, 1997. The only physical facilities for public telephone services Telmex did not own prior to January 1, 1997 were certain cellular telephone franchises. . . .

e. In the Mexican telephone system, toll-free calls to the U.S. are made through "International 800" ("I-800") telephone service. During or around October 1992, Telmex entered into identical contracts with MCI Telecommunications Corporation (MCI), AT&T, Sprint & IDB (the "Big Four") allowing them to use and resell the use of Telmex facilities to offer I-800 service to their U.S. customers. . . .

f. By entering these contracts with the Big Four, Telmex voluntarily relinquished its monopoly status to the extent of these contracts. Telmex also determined that it had excess capacity it could make available for resale. Telmex still held a monopoly on the physical facilities through which general public telephone services could be offered. It continued to have substantial market power. . . .

g. The I-800 contracts between Telmex and the big four were separate and distinct agreements from the general interconnect agreements which govern the handoff of international calls between these companies.

h. The Telmex contracts with MCI and the other three correspondents allow the resale of I-800 service to any U.S. customers. The Telmex contracts do not restrict to which U.S. customers or categories of customers MCI may resell the service. The contracts do not prohibit the resale of I-800 lines to U.S. companies for subsequent resale or reuse in business. . . .

i. MCI engaged in selling telephone services to allow business located in the United States to allow customers to contact them through a toll-free call. In order to provide the service, MCI used I-800 lines contracted from Telmex. MCI charged the customers located in the United States for the use of the Telmex line plus the line from the Mexico/U.S. border to the customer's U.S. location. . . .

j. Access Telecom, Incorporated ("ATI") is a U.S. based long distance telephone company which sold long distance telephone switching services for calls received from an MCI switch located in San Antonio, Texas, to businesses and individuals residing in Mexico. By connecting to this switch the customer could complete telephone calls in the United States and other countries at rates substantially below those charged by Telmex. Customers were sent itemized bills monthly for calls completed from the San Antonio switch. . . .

k. ATI connected its customers to the San Antonio switch by providing them with an I-800 number

provided by Telmex through agreement with MCI. MCI sold the I-800 numbers to ATI with full knowledge of how ATI intended to use the I-800 numbers in its U.S. long distance business. . . .

l. ATI used the I-800 lines only for the purpose of providing access to its service in San Antonio and the United States. ATI paid the charges for these lines contracted from MCI. ATI did not bill customers for the use of these numbers. That is, customers were not charged for calling the San Antonio switch whether or not a call was completed from the switch . . . .

m. The service provided by ATI and its use of I-800 lines to connect its customers in Mexico to U.S. based services was at all times legal under the laws of the U.S. . . .

n. ATI used Telmex facilities purchased through MCI to connect its customers in Mexico to its services in the U.S. ATI did not violate the General Telecommunications Law by using non-Telmex facilities within Mexico. I have seen nothing to indicate that Telmex did not receive the payments called for in its contract with MCI for the use of these facilities. . . .

o. Mexican citizens, residents and businesses have never been prohibited from purchasing telephone services outside Mexico from companies other than Telmex. There is no requirement in Mexican law that persons selling telephone services outside Mexico obtain any telecommunication license or permit from the Ministry of Communications and Transports ("SCT"). ATI did not violate any law in selling its U.S. based telephone services to businesses and individuals in Mexico. . . .

p. MCI lawfully contracted with ATI to provide ATI with Telmex I-800 lines with additional services to terminate these lines at ATI's switch in San Antonio. . . .

q. When Telmex entered into its I-800 contracts with MCI, it apparently failed to anticipate the possibility that I-800 lines would be resold by MCI to U.S. long distance companies, and that resale of these lines would create competition in the market for international long distance calls originating in Mexico. Therefore the Telmex-MCI contracts did not contain any language to prevent resale by MCI to this category of customers. . . .

r. Telmex had no legal right to unilaterally terminate the I-800 numbers resold to ATI. The unilateral termination of this service was illegal under Mexican law. At the time these numbers were disconnected payments to Telmex by MCI were current and MCI was not in violation of any contract with Telmex or any Telmex tariff. At the time the I-800 numbers resold to ATI were terminated there was no SCT rule or order in existence that determined the legal status of MCI's resale of I-800 numbers to ATI, or of ATI's use of the I-800 numbers to connect business and individuals in Mexico to its U.S. long distance service. . . .

s. In 1994, Mexico had not developed any laws or regulations pertaining to ATI's business practices because until Telmex signed the I-800 contracts with the big four, such practices were not possible. Telmex and the other defendants had no legal right to terminate the I-800 service of ATI or the other U.S. long distance telephone companies under the terms of the Concession or under the general laws of Mexico. . . .

t. On 4 October 1993, the SCT issued a document stating that "call back" procedures violated Mexican Law. . . . On April 29, 1994, Mr. Dennis Eidson sent a letter to Don Delaski of MCI alleging that resale was illegal in Mexico at that time. . . . On October 10, 1994, Andres Vazquez del Mercado sent a letter to all correspondents stating that resale was prohibited and demanding that all contracts be re-written to prevent resale. . . . Based on opinions by Salas and Orrico, Mexican attorneys familiar with Mexican administrative law, none of these documents is a lawful rule or order of the SCT or a true statement of the Law of Mexico. These documents do not provide a legal basis for termination of I-800 lines in 1994 by Telmex. Even if any of the above had legal effect—ATI was not and never did use the "call back" technique and so the above letter would have provided no justification for terminating service to ATI. MCI was on notice that Telmex thought "resale" was illegal as of October 1992. MCI continued to sell and enter into contract for I-800 lines to be used for "resale" as late as August 1994. . . .

u. Telmex defined the service that ATI was offering as "resale."

v. There is no reference or citation by any party to any code, statute, regulation or provision of the concession which would make ATI's actions illegal. By continuing to market I-800 telephone services after being notified by Telmex of its intent to cut of all "resellers", MCI effectively frustrated the purpose of the contract with ATI and other small resellers who were actually exporting U.S. switching services to Mexico. . . .

w. Telmex threatened to terminate all use of I-800 telephone lines by MCI unless MCI stopped making new contracts with U.S. long "resellers" and provided information to assist Telmex in identifying I-800 telephone numbers in use by U.S. "resellers" so they could be disconnected. . . .

x. MCI personnel identified specific I-800 telephone numbers as having been resold to U.S. long distance companies and designated them to be terminated. MCI personnel identified to Telmex/SBC the U.S. companies to which it had resold I-800 telephone numbers with knowledge this would lead to the termination of those I-800 numbers. Telmex personnel physically terminated the i-800 numbers MCI had resold to U.S. companies. . . .

y. MCI did not initiate any administrative action in the United States, through the FCC and the Court, or in Mexico, at the SCT, or any civil action in the Mexican Courts to enforce its rights under its contract with Telmex, and the rights of ATI and other U.S. long distance companies to which it had resold I-800 numbers.

4. The following are my opinions based on the above stated facts and assumptions:

a. Comparing ATI to other service business consumers of telephone service on an economic basis, it is my opinion that, economically, ATI's use of the I-800 lines was identical to the use of any other service business located in the United States which I-800 lines to allow businesses and individuals in Mexico to make a toll-free call to purchase services provided in the United States. Examples would be stock brokers, consultants, travel agents and on-line information services. In all

these cases, the customer is not charged for the use of the I-800 telephone line, but is charged for the services or advice obtained by the use of that line.

* * * *

f. Under the terms of the Concession, Telmex had the right to voluntarily surrender its legal monopoly prior to August 10, 1996. Telmex voluntarily surrendered this monopoly by entering into contracts with the big four in 1992 allowing the big four to sell I-800 service to their U.S. subscribers.

g. In the I-800 contracts with the big four Telmex failed to restrict the sale of the service to U.S. based long distance telephone companies other than the big four, like ATI. This allowed the U.S. long distance telephone companies to use the I-800 service to sell access to U.S. long distance services to Mexican businesses and households. The use of the I-800 service by ATI was consistent with the MCI contract with Telmex. The Mexican caller was never charged for the call from Mexico to the ATI switch in San Antonio.

See Supplemental Declaration of Ronald T. Luke, attached as Ex. B to ATI's Reply to MCI's Response to ATI's Motion

Clarence L. Cheshier

Clarence L. Cheshier, a non-attorney with an extensive background in the telecommunications industry in the United States,[19] offers the following opinion with regard to ATI's resale service in his affidavit:

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[19] Mr. Cheshier's Curriculum Vitae, attached as Ex. 1 to his affidavit, reflects the following:

2. **Background**

Education

Attended Texas Christian University, Ft. Worth, Texas and Southern Methodist University, Dallas, Texas.

Training

1975—Michigan State University, East Lansing, Michigan, U.S. Independent Telephone Association Cost Separation Course for Independent Telephone Companies that use Cost Settlements with Bell System.

1984—University of Wisconsin, Madison, WI, Access Charge Seminar, Course in NECA Tariffs.

Other Management Training

Southwestern Bell Tel. Co.: Intercity Services, Long Distance Usage Promotion, Organizational Development, Management Performance, Sales Development Training. Central Telephone Company of Texas: Public Utility Regulation (PUR).

Experience

1948-1972—Held various positions with Southwestern Bell Tel. Co. in Texas Plant, Marketing and Executive Departments.

1972-78—Mid-Texas Communications Systems, Inc., Vice-Pres., Bell Company Coordinator, General Manager—Houston Area.

1972-78—Woodlands Telecommunications Corp., Vice-Pres., Coordinator for antitrust case against S.W. Bell, Company representative, witness for Company's position in Federal District Court, Houston, TX. (Joint venture of Mid-Texas Communications Systems, Inc. and Mitchell Energy and Development Corp.)

Mid-Texas Communications Systems, Inc./Central Tel. Co. of Texas, Vice-Pres., Regulatory Activity with Public Utility Commission. (responsible for original CCN and Local/General Exchange Tariff filings for seven subsidiary companies.)

1979-1986—Provided consulting services for Independent Telephone Companies and Cooperatives, in areas of Planning, PUC Coordination, Tariffs, Regulator matters. Directed the preparation and filing of Local/General Exchange Tariffs for approximately eighteen Independent Telephone Companies and Cooperatives in Texas and Oklahoma.

1983-1993—Owner, Tel Net/Valu-Line, Lake Jackson, TX. (Long Distance Resale Company)

1986-89—Director, Texas Association of Long Distance Telephone Companies (TEXALTEL)

1986-97—Treasurer, Texas Association of Long Distance Telephone Companies

1987-89—Member of Regulatory Committee, Texas Association of Long Distance Telephone Companies

1992-93—Director, Texas Association of Long Distance Telephone Companies

1985-Present—Provided consulting services for approximately thirty-five Resellers and Long Distance Companies in states of Arkansas, Texas, Florida, Colorado, Pennsylvania, Kentucky, Louisiana and New Mexico in areas of Planning, Operations, PUC Coordination, Tariff/Regulatory Matters, CABS billing consultation and Acquisitions and Mergers. Consulting services and expert witness testimony in civil courts cases and Public Utility Commission of Texas proceedings. Consulting services for CLECs, SPCOAs, CAP providers and LSPs.

1996-Present—Owner of Valu-Net, Inc., SPCOA in Texas, for resale of local exchange services.

3. **Testimony-Consultant**

United States District Court, Southern District, Houston Division, Woodlands Telecommunications, Inc. v., Southwestern Bell Tel. Co. et al., Company representative and witness in antitrust action against S.W. Bell Telephone Co. (1972-1980).

Harris County District Court, Representative for Home Telephone Co./Central Tel. Co. of Texas, witness on tariff provisions concerning limitation of liability. (1983).

Public Utility Commission of Texas, Docket 7286, Complaint of Texas On Line Against Kerrville Telephone Co., consultant, expert witness for plaintiff. (1987).

Public Utility Commission of Texas, Docket 8063, Complaint of Flat Rate Communications, Against Southwestern Bell Telephone Co., consultant for plaintiff. (1988).

United States Bankruptcy Court, Northern District, Dallas Division, Olympia Telecom, Inc., et al, consultant for Olympia Telcom. (1988).

United States Bankruptcy Court, Beaumont Division, Southwest Communications, Inc., et al, consultant for Southwest Communications. (1988).

United States District Court, Northern District Dallas Division, Teleci, Inc. vs Hitachi America, Ltd. expert witness on product marketability for plaintiff. (1988).

United States District Court, Northern District, Dallas Division, Cause No. 84-4617-G, provided technical consulting services for attorneys representing D. Harold Byrd, Jr., et al, vs Southwestern Bell Tel. Co. (1988).

Public Utility Commission of Texas, Docket 8218/8585, Inquiry of the General Counsel into the Reasonableness of the Rates and Services of Southwestern Bell Telephone Co., expert witness on behalf of TEXALTEL in (November 1989).

Public Utility Commission of Texas, Docket 10645, Application of Southwestern Bell Telephone Co. on Behalf of the Texas Local Exchange Carrier Industry for Approval of New Service Offering, Optional Calling Plan (OCP), expert witness on behalf of TEXALTEL. (January 1992).

United States Bankruptcy Court for Western District of Texas, San Antonio Division, Case No. 92-52962K, Joe A. Bethancourt, d/b/a Penny Fone, Objections to MCI Proof of Claim by Debtor, consultant for Don E. Karr, Trustee. (June 1994).

District Court of Travis County, Texas 176th Judicial District, Cause 9400760, Capital Telecommunications, Inc. v. Public Utility Commission of Texas, The Audit Committee Established Pursuant to the Final Order in Docket 10127; and Southwestern Bell Telephone Co., authorized representative and consultant for plaintiff., (January 1994).

Galveston County District Court, Cause No. 89CV0240, Metro-Link Telecom, Inc., et al v. Southwestern Bell Telephone Co., et al, expert witness for Plaintiff (July 1993).

District Court of Denton County, Texas, 367th Judicial District, Cause No. 95-30259-367, GTE Southwest, Inc. vs City of Denton, et al., consultant for Defendant.

District Court of Cherokee County, Texas, 2nd Judicial District, Cause No. 95-5-00360, City of Rusk, et al, vs GTE Southwest, Inc., consultant for Plaintiff.

4. **Other Cases in Which I Have Testified by Trial or Deposition in the Last Four Years.**

State Regulatory Cases

(1) State Office of Administrative Hearings, Docket No. 473-95-1181, Public Utility Commission of Texas, Docket 7952, Complaint of Metro-Link Telecom, Inc. Against Southwestern Bell Telephone Co., expert witness on behalf of Plaintiff, (May 1996).

(2) New Mexico State Commission, Application of TCA Long Distance, Inc. For a Certificate of Convenience And Necessity to Provide Telecommunications Services Within the State of New Mexico, Docket No. 95-529-TC, consultant and expert witness for Applicant. (January 1996).

(3) Public Utility Commission of Texas, Complaint of Plexnet, Inc. and DFW-Direct Against GTE Southwest, Inc., Docket No. 15101, SOAH Docket No. 473-96-0069, consultant, expert witness for Plaintiffs. (1996).

State Court Proceedings

(4) District Court of Jefferson County, Texas, 136th Judicial District, Cause D-142, 176, City of Port Arthur vs. Southwestern Bell Telephone Co., et al consultant, expert witness for Plaintiff (1995).

(5) District Court of Travis County, Texas 250th Judicial District, Cause 9406509, ALLCOMM Long Distance, Inc. v. Public Utility Commission of Texas, and Southwestern Bell Telephone Co., consultant, expert witness for Plaintiff. (1995).

(6) United States District Court for Southern District of Texas, Houston Division, CA-H-94-1265, Canyon Services, Inc. vs. Southwestern Bell Tel. Co., consultant, expert witness for Plaintiffs.

Federal Court Proceedings

(7) United States District Court for Northern District of Texas, Dallas Division, Cause MDL903, Texas Municipalities v. Southwestern Bell Tel. Co. Fee Ordinance Litigation, expert witness (1994).

5. This activity and service were and are entirely legal under the laws of the United States. I recognize that Telmex was the exclusive provider of dial access and long distance service within Mexico, pursuant to its concession. Telmex was the only concessionaire that, during this period, was legally authorized in Mexico to provide international long distance service. It is my understanding that Telmex established an "affiliate" relationship with MCI, which it had the right to do under the terms of its concession. Once the traffic was delivered to the foreign interconnecting company ("MCI"), that company (MCI) had the authority to terminate the traffic through other local or long dis-

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(8) United States District Court for Southern District of Texas, Houston Division, CA-H-94-1265.

5. **Participation in Currently Pending Cases:**

State Court Proceedings

141st Judicial District of Tarrant County, Texas, Cause No. 141,15622-94; Fort Worth Independent School District v. City of Fort Worth, et al., consultant, expert witness for Plaintiff.

37th Judicial District Court, Bexar County, Texas, Cause No. 96-CI-08912, Long Distance International, Inc. and Star Marketing Services, Inc. v. Telefonos de Mexico, S.A., SBC International, Inc., SBC International Latin America, Inc., SBC Communications, Inc., American Telephone & Telegraph Company and MCI Telecommunications, Corporation, consultant, expert witness for Plaintiffs.

Federal Court Proceedings

United States District Court for the Southern District of Texas, Houston Division, CA-H-94-4106, Star Tel, Inc. v. TCA Communications, Inc., TCA Cable TV, Inc., Lufkin Conroe Telecommunications Corporation, LCT Long Distance, Inc., and Lufkin-Conroe Telephone Exchange, Inc.; consultant, expert witness for Defendants.

Canyon Services, Inc. v. Southwestern Bell Tel. Co., expert witness for Plaintiff. (1996).

tance public networks interconnecting or reselling to other public long distance networks or, in this case, contracting with other resellers who arranged the termination of these calls. These activities, contracts and this type of service did not violate American regulatory law, including ATI's service as it related to Telmex.

6. The services offered by ATI, and including its contract with MCI, and its agreement with its customers to provide the "I-800" service from Mexico, is entirely legal under United States law and violates no statute, regulation or any other legal authority. There is, in fact, no statute specifically addressing or prohibiting the services offered by ATI in the United States.

* * * *

See Affidavit of Clarence L. Cheshier, attached as Tab E to the Appendix to ATI's motion.

VI. SBC and MCI's Experts

Jose Varela

The affidavit of Jose Varela, an attorney who works in the legal department for SBC Communications Inc., states, in relevant part, as follows:

3. I am fluent in the Spanish language and am able to read and write in Spanish. I am competent to translate written Spanish text into English, and capable of discerning the accuracy of English translations of Spanish text.

4. Attached to this affidavit are true and correct copies of English and Spanish excerpts of the "Ley de Vias Generales de Comunicacion" (General Means of Communication Law), and English excerpts of the "Reglamento de Telecomunicaciones" (Telecommunications Rulings). (Exhibits 1 & 2 hereto). I have

read the Spanish text and am otherwise familiar with these Mexican laws. Upon my review of the English translations attached hereto, it appears that the English text represents reasonably accurate translations of the Spanish laws. There is no substantial deviation in the English text that would alter the meaning of the Mexican laws from which the translations attached to this affidavit are derived.

5. While employed with SBCI in Mexico City, I worked very closely with Telmex in furtherance of SBCI's duties as a consultant to that company under an operational and management fee agreement ("management agreement"). . . .

6. As a former attorney for SBCI in Mexico City working under the above described consulting arrangement, I am very familiar with the laws governing the telecommunications industry in Mexico. This familiarity is based upon my direct participation in regulatory issues acing the business of Telmex through groups consisting of both Telmex and SBCI employees. For example, it was common for Telmex lawyers to be a part of "groups," to which I also was assigned, charged with various legal and regulatory issues. It is through involvement in these groups, receiving reports and information from Telmex' lawyers, and from my consequent review of Mexican regulations and legislation that I obtained knowledge of the laws affecting I-800 resale services to customers in Mexico.

7. The principal laws which govern the telecommunications industry relevant to the acts of this lawsuit include the "Ley de Vias Generales de Communicacion" (General Means of Communication Law), "Reglamento de Telecomunicaciones" (Telecommunications Rulings), and the Amended Title of Concession of Telefonos de Mexico (Telmex). Under these laws,

Telmex was granted the exclusive concession to act as a public telecommunications service provider of long distance services until August 10, 1996, when deregulation of the telecommunications industry began to be implemented in Mexico. Prior to deregulation, Telmex was not obliged to allow resale of its excess circuit capacity for long distance services and, in fact, did not allow resale as a uniform policy of that company. A Telmex document called a "denouncement" or "accusation" filed with the Ministry of Communications and Transportation (SCT) sets forth in greater detail the laws applicable to resale services and the position of Telmex that provision of such services were illegal at all times material to the instant lawsuit. This document is attached hereto, and is a true and accurate English translation of the original Spanish text. (Exhibit 3 hereto).

8. I have reviewed the affidavits of Miguel Orrico Alarcon, Bradley M. Tirpak and Clarence L. Cheshier presented by plaintiff in support of its motion for partial summary judgment. Based upon my review of the excerpts of Mexican laws and regulations attached hereto and the provisions of the Amended Title of Concession, certain statements made in those affidavits appear to be incomplete or incorrect with respect to the legality of ATI's resale service. Specifically, in Mr. Orrico's affidavit, he states that the services provided by ATI "violated no statute, regulation, or other legal authority." Mr. Orrico overlooks, however, the requirement of a permit, concession or contract in order to provide a telecommunications service, e.g., to resell I-800 in Mexico. The Amended Title of Concession, Articles 1-11 and 4-10, recognizes that users and subscribers require a contract with Telmex. Article 8 of the General Means of Communication Law also requires a concession,

permit or agreement to "exploit" general routes of communication. The Telecommunications Rulings, Articles V, 75 and 84, require a concession or permit to "render telecommunications services" and prohibit "commercialization" except by a concession holder, without approval by the Secretary of Communications and Transportation (SCT). Commercialization is synonymous with reselling. As I understand ATI's service, this company never obtained a concession, permit or other authorization to act as an international reseller servicing customers located in Mexico. Without such authority, ATI's I-800 resale service would be in violation of Mexican law.

9. In addition, Mr. Orrico's reference to Article 84 of the Telecommunications Rulings as support for the legality of ATI's service has no apparent application. As revealed by that provision and Mr. Orrico's explanation of it, "Telmex has to comply with the terms of the contracts . . . [and] can only interrupt or cancel services within the terms of such contracts." Because ATI had no contract with Telmex, it would not be a violation for Telmex to disconnect its unauthorized I-800 resale service.

10. Mr. Orrico's affidavit also does not properly address the October 4, 1993 letters of the SCT, signed by Mr. Jose Maria Rivas Moncayo. The SCT is the Mexican equivalent to the Federal Communications Commission (FCC) in that country and is charged with oversight of the telecommunications industry. The October 4, 1993 letters recognize the unauthorized nature of 1-800 resale and advised that it should be discontinued.

11. With respect to Mr. Tirpak's affidavit, the laws of both Mexico and the United States, referenced above, also indicate that the conclusions drawn by Mr. Tir-

pak are without support. Moreover, any verbal communications with the SCT referenced by Mr. Tirpak would not rise to the level of a public order. Instead, the October 4, 1994 letters are given great deference under Mexican law and are considered to be akin to public orders, issued by the executive branch of Mexico's equivalent of the FCC.

12. In summary, presented herewith are true and correct English translations of applicable Mexican laws showing that authorization was required to operate or exploit a general means of communication through the provision of an international resale service. ATI's lack of such authority rendered their I-800 resale service illegal.

See Affidavit of Jose Varela, attached as Tab 3 to the Appendix attached to SBC Defendants' Response.

Francisco Manzanero

Francisco Manzanero, a Mexican attorney, avers the following in his affidavit:

> This legal opinion is rendered upon the basis of the analysis of the facts stated hereinbelow (which are the same facts contained in your [Judith Blakeway, attorney for MCI] letter dated June 3, 1997, assuming that such facts are true, and considering and evaluating the same in light of the applicable legal and regulatory provisions in force and effect in the United Mexican States (hereinafter "Mexico"), not only at the time when those facts took place, but also at the present time.
>
> This legal opinion is also based on the review of the following documents:
>
> i). The documents that you provided me within photocopy and that are set forth in the list attached hereto as *Exhibit "1"*, wherein the Amendment to the

Title of Concession granted by the Ministry of Communications and Transportation in favor of Telefonos de Mexico, S.A. de C.V., published in the Federal Official Gazette of December 10, 1990, is included.

ii). Report rendered by Mrs. Elvia Salas, expert witness on Mexican Law retained by Plaintiffs, copy of which you sent to me via fax on July 3, 1997.

iii). Official letter dated June 6, 1999 issued by the General Director for Networks and Radiocommunication and by the General Coordinator for Planning and SCT Centers, both of the Ministry of Communications and Transportation, copy of which you sent to me via fax on July 10, 1997.

iv). Declaration of Mr. Miguel Orrico Alarcon rendered on August 11, 1997, regarding civil action number SA-96-CA-1064, which you sent to me with your letter dated August 14, 1997.

v). Official letter dated April 20, 1995 issues by the General Director of the "Direcion General de Politicas y Normas de Comunicaciones" (General Bureau of Policies and Communication Rules) of the Ministry of Communications and Transportation, addressed to Mr. Bradley Tirpak, Representative in Mexico of Access Telecomm., Inc., which you sent to me via fax on August 22, 1997.

In rendering my opinion, I assume (sic) that all the above mentioned documents are authentic and true, and that the following facts are also true and correct.

I. FACTS

"MCI entered into two contracts with Star Marketing Service, Inc., under the terms of which MCI furnished international 800 service to Star Marketing Service, Inc. Star Marketing Service, Inc., made these numbers available to Long

Distance International, Inc. (LDI). LDI sold this service to customers in Mexico. Customers' PBXs would be programmed to connect to a switch in San Antonio, Texas. The customer then would enter an identification code, receive a dial tone, and could then dial any number in the world. Telefonos de Mexico, S.A. de C.V. (Telmex) became aware of this practice and disconnected LDI's international 800 numbers. Telmex allegedly disconnected the numbers between July 1994 and January 1995. However, Star Marketing Service, Inc., had approximately 150 working numbers and only 10 to 15 were disconnected. Star Marketing Service, Inc., has sued MCI alleging MCI provided its 800 numbers to Telmex or confirmed the numbers to Telmex."

The above are the facts as stated in your aforesaid letter dated June 3, 1997. Access Telecom, Inc.'s service worked basically the same way, as described in Tirpak Ex. 2. The customer would dial the access 800# in the United States, at the voice prompt, enter his personal identification number, and then dial anywhere in the world.

II. LEGAL ISSUE

Before answering the following legal issue, with respect to which this opinion has been requested, it is important to mention the following:

1. The Mexican legal system is a system based and created following the Roman or Civil Juridical Tradition, which is based on legislation rather than on a stare decisis system. Therefore, this opinion will be supported by the applicable Mexican legal and regulatory provisions.

2. It is uncontestable that Mexican telecommunications law, as such, is not an independent branch of law. On the contrary, it is a derivation of the Administrative Law that specifically deals with the telecommunications filed and that is based on and regulated by all the same general legal principles that are applicable in Administrative Law.

The question is whether Star Marketing Service, Inc. and Long Distance International, Inc.'s and Access Telecom, Inc.'s actions were legal and appropriate under Mexican telecommunications law, and whether Telmex' actions were legal and appropriate.

III. LEGAL SUPPORT OF THE OPINION

Before answering such question, reference is made to the general legal frame of Constitutional and Administrative Law applicable to telecommunications in Mexico.

1. *"Constitucion Politica de Los Estados Unidos Mexicanos" (Constitution of Mexico).*

Pursuant to the final part of the fourth paragraph of Article 27 of the Constitution of Mexico, the Nation has the direct domain and ownership of the aerial space situated over the Mexican territory, in accordance with the extension and terms set forth by the International Law.

Paragraph sixth of the same Constitutional provision, sets forth that "in the cases referred to in the two preceding paragraphs, the domain of the Nation is inalienable and imprescriptible, and the exploitation, use and utilization of the resources mentioned therein, by private individuals or by private corporations organized under the Mexican Laws, cannot be done unless the corresponding concession granted by the Federal Executive Power, pursuant to the rules and conditions set forth by the applicable laws, is obtained.

2. *"Ley General de Bienes Nacionales" (General Law of National Property).*

Under Section II of Article of the General Law of National Property, all those assets or property included, among other, in the fourth paragraph of Article 27 of the Constitution of Mexico, are property of public domain ("son bienes del dominio publico").

Article 16 of the General Law of National Property sets forth that the assets or property of public domain are inalienable and imprescriptible. Therefore, the private entities or public institutions may only use, exploit and utilize such property pursuant to the regulations of such law or of other laws enacted by the Federal Congress.

3. *"Ley de Vias Generales de Comunicacion" (Law of General Communication Systems).*

Sections IX and X of Article 1 of this Law, used to include and consider in the past the telephone lines as general communications ways, with the requisites stated therein, including with the same character the electric conductor lines used to establish communications of signals, written documents, images or sounds of any type whatsoever.

However, such Sections were repealed by the Second Transitory Provision of the recent Federal Law on Telecommunications, which I will refer to hereinbelow.

Article I of the Law of General Communication Systems, sets forth that to build, establish or exploit general communications ways or any kind of services related thereto, it is necessary to obtain a concession or permit granted by the Federal Executive Power, through the Ministry of Communications and Transportation, pursuant to the applicable legal and regulatory provisions.

Article 12 of the same Law mainly sets forth that the concessions for the building, establishment or exploitation of general communications ways or systems, will only be granted to Mexican citizens or to corporations organized under the laws of the country.

4. *"Ley Federal de Telecomunicaciones" (Federal Law on Telecommunications).*

This Law is not very old. On the contrary, it was enacted on May 18, 1995, published in the Federal Official Gazette on

June 7, 1995, and came into effect on June 8, 1995, with some exceptions.

Pursuant to Article 1 of such Law, the provisions of the same are public order provisions with the purpose to regulate the use, utilization and exploitation of the radioelectric spectrum, of telecommnunications networks and of satellite communications.

Article 3 of this law contains the definition of several fundamental concepts, including, among others, telecommunications networks, public and private telecommunications networks, and telecommunications. Telecommunications is defined as any emission, transmission or reception of signals, written documents, images, voice, sounds or information of any kind whatsoever made through wires, radioelectricity, optical or physical means or other electromagnetic systems.

This Law also includes within the general communication systems, the radioelectric spectrum, telecommunications networks and satellite communication systems.

Article 8 sets forth the possibility to apply the pertinent provisions of the International Treaties on telecommunications to which Mexico is party.

In Article 11, section II, it is set forth that in order to install, operate and exploit public telecommunications networks, it is necessary to obtain a concession granted by the Ministry of Communications and Transportation (hereinafter "The Ministry").

Pursuant to Article 12, the concessions referred to therein, are exclusive for Mexican individuals or Mexican corporations.

Chapter IV of this Law refers to the operations of telecommunications services (Articles 41 through 50).

In accordance with the provisions of this Chapter, the Ministry will prepare and administer the basic technical plans holders of concessions of public telecommunications net-

works must comply with. Such plans shall take into account the interest of the users and the interest of the holders of concessions.

The Law provides for the obligation of network interconnection, as well as the term the holders of concessions have to take it into effect. It also establishes the contents of the agreements under which such interconnection shall be executed, and the obligations of the holders of concessions of public telecommunications networks.

Concessions regarding public telecommunications networks are granted for a term of 30 years, which may be extended for the same period. Private telecommunications networks do not require concession, permit or registry to operate, unless they use frequency bands o the spectrum. However, operators or private networks need a concession to exploit services for commercial purposes.

Pursuant to Article 47 of this Law, in connection with Article 7 Section II of the same, the Federal Telecommunications Commission has authority to promote and watch over the efficient interconnection of the telecommunications equipments and public networks, including the one carried out with foreign networks, as well as to approve the corresponding interconnection agreements, and to authorize the installation of telecommunications equipments and transmission media that cross the border of the country.

The Federal Communications Commission was created by a Presidential Decree published in the Federal Official Gazette of August 9, 1996, and in exercise of the authority ad powers conferred upon it by the Law, said Commission issued the Administrative Telecommunications Rules referred to hereinbelow, published in the Federal Official Gazette of December 11, 1996.

5. *Reglamento de Telecommunicaciones" (Telecommunications Regulations).*

Such Regulations were published in the Federal Official Gazette of October 29, 1990, namely, when the provisions of the Law of General Communication Systems regarding telecommunications were still in force and effect, and of course before the Federal Law on Telecommunications was enacted. However, pursuant to the Third Transitory Provision of the Federal Law on Telecommunications, the Telecommunications Regulations will continue in force and effect until the enactment of new regulations. In view of the fact that such new regulations have not been enacted up to this date, the Telecommunications Regulations are sill in force and effect, provided that they are not contrary to the Federal Law on Telecommunications.

Article 2 of the Telecommunications Regulations sets forth several definitions, including the following terms:

Telecommunications, Telecommunications Network, Public Telecommunications Network, Telephone Line, Public Telephonic Network, Local Network, Long Distance Network, National Long Distance Service, International Long Distance Service, Telecommunications Services, Individuals or Corporations that Render Telecommunications Services, etc.

In accordance with the pertinent provisions of the Telecommunications Regulations, the Long Distance Network is a Telecommunications Network and the Public Telephonic Network is a Public Telecommunications Network (Article 2 Section II). Likewise, in order to render Telecommunications Services, and to install, establish, operate and exploit Telecommunications Networks, it is necessary to obtain a concession or permit, as the case may be, granted by the Federal Executive Power, through The Ministry (Article 6).

Under Article 7 of the Telecommunications Regulations, the individuals or corporations need a concession granted by The Ministry to install, establish, operate and exploit a Public Telecommunications Network, in the understanding that the installation of land Long Distance Telecommunications Networks that render services to the public or among third parties, requires a concession.

6. *"Reglas para prestar el servicio de larga distancia internacional que deberan aplicar Los concesionarios de redes publicas de telecomunicaciones autorizados para prestar este servicio" (Rules to render the international long distance service that must be applied by the holders of concessions of public telecommunications networks authorized to render this service).*

As above mentioned, these Rules (hereinafter collectively referred to as "the Rules" or "Rule" when used in singular), were issued by the Federal Telecommunications Commission, published in the Federal Official Gazette of December 11, 1996, and came into effect on the next day of the publication thereof, being obvious that when the facts from which the cause of reference arises took place, namely, between July 1994 and January 1995, the Rules did not even exist.

The Rules that I consider more relevant for the purposes of this report are, among others, the following:

a). Rule 1 which sets forth that the object and purpose of the Rules is to regulate the rendering of the international long distance service and to establish the modalities to which the agreements for the interconnection of public telecommunications networks with foreign networks, must be subject.

b). Rule 2 which contains the definition of several terms and in Section XI thereof, it is stated that the international long distance service is the one that transmits all the international commutated traffic through the long distance central

telephone exchanges authorized as international ports, as this term is defined in Section VIII of the same Rule 2.

c). Rule 3 which sets forth that only the international port operators are authorized to directly interconnect themselves with the public telecommunications networks of operators of other countries in order to transmit international traffic.

d). Rule 4 which states that pursuant to Article 47 of the Federal Law on Telecommunications, only the international port operators or the persons expressly authorized by the Federal Telecommunications Commission, will be able to install telecommunications equipments and transmission media that cross the borders of the country.

e). Rule 5 which orders that to render international long distance services in Mexico, it is necessary to have a concession granted by the Ministry pursuant to the Law. It also sets forth that no foreign operator would be entitled to use transmission or commutation media that allow the direct rendering of international long distance services in Mexico, without the intervention of a duly authorized Mexican holder of a concession.

f). Rule 6 under which the holders of concessions for the long distance service may request to the Federal Communications Commission authorization for the operation of international ports.

h). Rule 22 which orders, pursuant to Article 47 of the Federal Law on Telecommunications, that the interconnection of public telecommunications networks with foreign networks, will be carried out through agreements entered into by and between the interested parties, in the understanding that under Rule 23, such interconnection agreements must be submitted to the Federal Telecommunications Commission for the authorization thereof before the same are executed.

IV. CONCESSION GRANTED IN FAVOR OF TELMEX

On March 10, 1976, the Mexican Federal Government granted a concession in favor of Telmex, being undisputable that until January 1997, Telmex was the only company authorized by the Mexican Federal Government to offer and render public telephone services in Mexico.

On December 10, 1990, namely after the date on which the Telecommunications Regulations were published, it was published in the Federal Official Gazette an Amendment to the Title of Concession granted in favor of Telmex. Such Amendment was made by the Federal Government through The Ministry, with basis on the applicable legal provisions mentioned in the preceding Section III hereof, that were in force and effect at that time.

For the purposes of this legal opinion, the original Title of Concession and the Amendment to the Title of Concession of Telmex, will be hereinafter collectively referred to as "The Concession".

The Concession was granted by The Ministry in favor of Telmex to build, install, maintain, operate and exploit a Public Telephonic Network for a period of 50 years counted as from March 10, 1976, covering the whole Mexican territory, with exception of the area object of the concession granted in favor of Telefonos del Noreste, S.A. de C.V.

By virtue of The Concession, Telmex was bound to render the following services through the Public Telephone Network:

a). Public service of conduction of signals of voice, sounds, data, texts and images, to local level and of national and international long distance.

b). The public service of basic telephony.

Chapter I of The Concession makes reference to the definition and scope of The Concession.

In Article 2-4 of The Concession, The Ministry reserved the right to grant other or others concession in favor of third parties to exploit in the same circumstances, within the same territory or in a different territory, the same or similar services to those subject matter of The Concession.

In Article 2-5 of The Concession, it is set forth that Telmex may not assign, transfer, mortgage, encumber or sell in any manner whatsoever, either totally or partially, The Concession or the rights derived there from, in favor of third parties, without the previous approval of The Ministry. This provision is very important because by virtue of the same, Telmex was not entitled to permit that any third party might render services equal or similar to those included in The Concession.

Pursuant to Article 3-6 of The Concession, Telmex assumed the obligation to install, operate and maintain the substructure of transmission and commutation of the Network (as such term is defined in The Concession), devoted to conduct long distance signals. In order to fulfill the requirements of such services, Telmex had the right to use public networks of other long distance operators.

It is also important to mention that under first paragraph of Article 4-5 of The Concession, beginning as from January 1st, 1997 (which date agrees and coincides with the date provided for in the tenth transitory provisions of the Federal Law on Telecommunications and in the second transitory provision of the Rules, for the same purposes and effects), The Ministry had the right to obligate Telmex to permit the interconnection of other long distance public networks in such a way that the user may choose the basic network that he wants to use for his telephone calls.

This means that before January 1st, 1997, The Ministry could not force Telmex to allow interconnection with other long distance public networks.

On the other hand, under first paragraph of Article 5-7 of The Concession, Telmex is required to permits its users to resell the exceeding capacity of the circuits contracted with Telmex, except as provided "in the following paragraph."

The following paragraph of the same Article sets forth that during the fist six years of The Concession, Telmex will not be bound to permit the reselling of the exceeding circuit capacity, to provide basic long distance telephonic public service.

In view of the fact that the above mentioned amendments to The Concession were published on December 10, 1990, in my opinion it must be logically construed and interpreted that the aforesaid six years period must begin in December 1990 to conclude in December 1996 and, therefore, the obligation imposed on Telmex by the first paragraph of Article 5-7, was not in force during this period of time.

V. REPORT RENDERED BY MRS. ELVIA SALAS, EXPERT WITNESS ON MEXICAN LAW RETAINED BY PLAINTIFFS.

On June 24, 1997, Mrs. Elvia Salas de de Stefano, rendered her report with the above mentioned character, and on July 3, 1997 I received via fax a copy of the Spanish version of said report.

After reviewing such report, I consider that the conclusions contained therein are incorrect and, therefore, I positively disagree with its contents.

The reasons that support my disagreement with such report, are as follows:

1.) In first place, Mrs. Elvia Salas did not include in her report the facts that originated the dispute to be resolved in the legal cause of reference, as such facts were informed to me.

Indeed, in such report it is only stated in the first paragraph thereof, that the telecommunications business carried out by Star Marketing and LDI from January 1st, 1993 through January 1st, 1996, basically consisted in terminating international calls in the United States of America, originated in Mexico, with what Mrs. Salas names "las siguientes condicionantes" (the following conditions).

It is important to mention that in the condition identified with letter c), at the end of the same Mrs. Salas sets forth an assumption which I cannot affirm, namely, that the interconnecting long distance company (MCI) through the contract with Star Marketing and LDI, "delivered the traffic to the latter for the purpose of providing the collect service and, eventually, terminating the call, without ever disconnecting to the American carrier or to the Mexican holder of the long distance concession", in the understanding that I cannot sustain such assumption.

2. By that time, Telmex was the only holder of a concession to render the international long distance service in Mexico, in the understanding that this is expressly acknowledged twice by Mrs. Elvia Salas in her report (in the first two paragraphs of page 2). Therefore, Telmex was the only entity entitled under Mexican Law to render such service, but this does not mean in any manner whatsoever that Telmex had intended to determine the form or way of the termination of telephone calls in foreign territories. Besides, as far as I understand, Telmex never intended to apply Mexican Laws or Regulations abroad.

3. Pursuant to all the legal and regulatory provisions referred to in Chapter III hereof, the rendering in Mexico of international long distance services by any entity different from Telmex during 1994 and 1995, was unlawful and, therefore, against Mexican Law. For the same reasons I consider that the disconnection by Telmex of LDI's international 800 num-

bers was lawful and did not require any administrative or judicial order.

4. It is true that Telmex is entitled to stop the rendering of its services and to rescind the agreements entered into with its clients and subscribers, only when such clients and subscribers do not pay on time the corresponding tariffs or tolls or if they fail to fulfill the obligations provided for in the respective agreements.

However, it is very important to point out that neither Star Marketing Service, Inc. nor Long Distance International, Inc. were Telmex subscribers during the relevant period. Therefore, Telmex did not act unlawfully.

In view of the foregoing, it is not true what Mrs. Salas sets forth in the last two paragraphs of her report, because the official communication number 119.206.0320 issued by the Ministry on February 2nd, 1996 does not state that Telmex had acted unilaterally and without an administrative or judicial order, and does not mention either that the suspension of the service and the rescission of the contract were illegal.

On the contrary, such official communication sets forth in summary the following:

That prior to the enforcement of the Federal Law on Telecommunications, namely, before June 8, 1995, Telmex had the obligation to fulfill with the provisions of the Law of General Communication Systems (Ley de Vias Generales de Comunicacion) and of the Telecommunications Regulations (Reglamento de Telecomunicaciones), and therefore, Telmex was only entitled to interrupt the telephonic services to its subscribers, in the event that they had not paid the applicable tolls, or in the event of noncompliance with the service agreements.

As it can be easily seen, such official communication does not set forth what Mrs. Salas is saying in her report, in the

understanding that in connection herewith, it is very important to insist that the plaintiffs were not Telmex's subscribers and, therefore, official communication number 119.206.0320 is not applicable in any manner whatsoever to plaintiff.

VI. DEPOSITION TAKEN BY MRS. ELVIA SALAS ON JULY 21, 1997.

After reviewing the report of the oral deposition of Mrs. Elvia Salas taken on July 21, 1997, I consider that some of her affirmations are contradictory and incongruent. Therefore, I disagree with Mrs. Elvia Salas conclusions, because in my opinion they are incorrect.

I support my position as follows:

1. On page 32, lines 5 through 8, Mrs. Salas confesses that "in order to have some legal traffic it must go through the Telmex network" (it must obviously be understood as traffic of telephone calls).

2. On page 32, lines 9 through 12, she agrees that in 1994 Telmex was the only concessionaire that was legally authorized in Mexico to provide international long distance service.

3. On page 60, lines 21 and 22, she says that in Mexico "for the person that's governed what is not prohibited is permitted."

In connection herewith, it must be said that it is true that in Mexico there is a General Principe of Law that states that "what is not prohibited, is permitted". However, it is also true that such principle is applicable only in the field of Private Law, namely, to the legal relationships between private or particular individuals or entities, in the understanding that when there is a legal relationship of Public Law in which an agency or entity of the Government, or the Government itself is involved, then such tenet is not applicable in the same terms and conditions.

On the contrary and pursuant to a sound, correct, logical, total and harmonic interpretation and construction of all the judicial principles that regulate and apply to the Mexican Legal System, it must be said that in the case of legal relationships between the Government and private or particular individuals or corporations, which are relationships of Public Law, the principle is different.

In the first place, the authorities can only do and carry out the acts that the law expressly entitles them to do, but in accordance with this, there are certain acts and activities of Public Law that particular or private individuals or corporations are not permitted to do or to carry out, unless they have a specific authorization, permit or concession granted by the competent authorities, in the understanding that precisely those authorizations, permits or concessions may be granted by the authorities, because the law entitles them to do so.

In the case of merit and based on the following constitutional, legal and regulatory provisions that I mentioned in Section III hereof, which by the way are public order provisions and therefore they are not renounceable, it is evident that in Mexico the rendering of the public service of telephone telecommunication requires a concession without exception:

* Paragraphs 4 and 6 of Article 27 of the Constitution of Mexico.
* Article 16 of the General Law of National Property (Ley General de Bienes Nacionales).
* Articles 8 and 12 of the Law of General Communication Systems (Ley de Vias Generales de Comunicacion).
* Articles 11 and 12 of the Federal Law on Telecommunications (Ley Federal de Telecomunicaciones).

Article 6 of the Telecommunications Regulations (Reglainento de Telecomunicaciones). Therefore, in this case it is

not true that LDI and Star Marketing Service, Inc., were entitled to render long distance telephone services in Mexico during the relevant period of time, because they did not have the corresponding concession granted in their favor pursuant to the Law.

4. On page 92, lines 11 through 14, Mrs. Elvia Salas expressly acknowledges that there was no legal way of making a long distance call from Mexico to any place in the rest of the world without using Telmex infrastructure.

5. On page 95, line 25, and on page 96 line 1, Mrs. Elvia Salas accepts that there was a legal relationship established between Telmex and MCI. In this point, she did not mention any other different third party as a contracting party with Telmex.

6. On page 136, lines 1 and 2 and lines 4 through 9, she tries to give legal support to her statement contained therein. However, her response is not correct because the bill of rights of the Mexican Constitution is contained in Articles 1 through 29, and not in Articles 1 through 23.

7. On page 137, lines 7 through 17, in my opinion she is giving again an incorrect legal support to her statement.

8. On pages 148, lines 19 through 22; 149, lines 1 through 11 and 19 through 24; 150, lines 8 through 25 and 155, lines 1 through 9, there is enough evidence to demonstrate that Mrs. Elvia Salas did ignore several details related to the form in which LDI operated, and I think that this should take credibility off to her report. Moreover, with the questions and answers contained therein, it is clear that LDI was rendering services in Mexico.

9. On pages 152, lines 21 through and 153, lines 1 through 11, she acknowledges and accepts "the position of SCT", namely, that any company performing telephone service in Mexico, would require either a concession or a permit. She also agrees that because neither Star nor LDI had a conces-

sion nor a permit from Mexico, nor did they have any agreement with Telmex, they were prohibited from performing international long distance service from Mexico.

10. Finally, in page 187, lines 11 through 18, when she was asked if the whole basis for her opinion was that what LDI was doing was not illegal because LDI was not doing business in Mexico, she answered that the basis for her opinion was rather that "the service was not provided in Mexico", and she also accepted that if she were wrong about that (what as a matter of fact did occur), then her opinion was also wrong.

Therefore, in view of all the foregoing, I think that Mrs. Elvia Salas' conclusions are not correct.

VII. DECLARATION OF MR. MIGUEL ORRICO ALARCON, RENDERED ON AUGUST 11, 1997 CAUSE NO. SA-96-CA-1064.

Mr. Miguel Orrico Alarcon declared on August 11, 1997 in Civil Action SA-96-CA-1064; however, apparently the facts and the legal issues of both causes are quite similar.

In general terms, the conclusions of Mr. Orrico's declaration are very similar to the conclusions of Mrs. Salas' report. Thus, I also disagree with Mr. Orrico's point of view.

Mr. Orrico sets forth that ATI performed "certain telecommunication services consisting basically of terminating international calls in the United States, originating in Mexico" and makes reference to the same conditions stated by Mrs. Elvia Salas in the Spanish version of her report (final part of Section 3 of his declaration). He also says that such activities were not illegal or unlawful under Mexican Law.

I positively disagree with Mr. Orrico's opinion in view of the foregoing:

1. In first place, Ms. Orrico acknowledges that the services offered by ATI in the case that is similar to the LDI case,

consisted in terminating international calls that were originated in Mexico. He also accepts that the services offered by ATI were to provide the I-800 service to and from Mexico (Section 5 of his declaration).

Those affirmations mean that there was a communication service that was rendered without the corresponding authorization, permit or concession, and this, of course, is against Mexican telecommunications laws.

2. In Mexico, the activities carried out by ATI, in the cause in which Mr. Orrico declared, require the obtainment of the corresponding concession, because those activities were part of long distance services, with all the legal consequences pertaining thereto.

3. Mr. Orrico says that any attempt by Telmex to unilaterally cancel and/or disconnect the I-800 service in Mexico is illegal under Mexican Law. If such were the case, which of course I do not accept, the party that entered into the agreement with Telmex, which as far as I know was also MCI, would be the only interested and legitimated to bring a legal action against Telmex, but not any other third party different from such contracting party.

Therefore, since ATI, as far as I know, did not enter into any agreement with Telmex, then ATI has no legal interest or legitimation to contest Telmex performance.

4. In my opinion, Articles 62 and 63 of the "Ley de Vias Generales de Comunicacion", were not infringed in any manner whatsoever and the reasons for this are, first, because ATI was not a user or subscriber of the services rendered by Telmex and, second, and as a consequence of the foregoing, because the conditions set forth by the law and the regulations thereof, were not fulfilled.

Additionally, we could say that ATI never entered into any agreement directly with Telmex and, as far as I know, ATI

never requested directly from Telmex the rendering of long distance telephone services.

5. For the same reasons, it is also clear that Articles 78 and 84 of the "Reglamento de Telecomunicaciones" were not infringed in any manner whatsoever.

6. In my opinion, clauses 4-2, 4-10 y 5-5 of the concession were not infringed or violated in any manner whatsoever. In fact, those clauses have no application to the case of merit, because ATI was not an authorized user of Telmex's services.

7. In connection with the arguments of Mr. Orrico regarding the tenet of Mexican Law that "one can do any thing that is not prohibited by law", in order to avoid unnecessary repetitions here I make a express reference to what I said in the above Section VI paragraph 3.

8. I agree with Mr. Orrico when he says that "ATI's interconnection agreement with MCI was valid and not illegal in Mexico". However, I disagree when he refers to the use of I-800 services. In fact, ATI provided indirectly long distance telephone services in Mexico without having the corresponding concession, and this is against Mexican Law.

VIII. CONCLUSION

In view of the foregoing, the answer to the question raised, is that *the action of Star Marketing Service, Inc. and Long Distance International, Inc. and Access Telecom, Inc. were not legal and were not appropriate under Mexican telecommunications law.*

Therefore, I disagree with Mrs. Salas' and Mr. Orrico's conclusions.

In my opinion, when Telmex disconnected the LDI's and ATI's international 800 numbers, Telmex acted lawfully, properly and in accordance with Mexican Laws. The practices observed plaintiffs eluding Telmex, was illegal and in

violation of the above mentioned legal and regulatory provisions, infringing also the exclusivity granted by the Mexican Federal Government in favor of Telmex by virtue of The Concession, which exclusivity was still in full force and effect during the relevant period.

Such criterion is confirmed by the following official communications:

1. Official communication number 110-3229 dated October 4, 1993, addressed to MCI by Mr. Jose Maria Rivas Moncayo, who at that time was a legitimate officer of The Ministry, which official communication is included in the list attached hereto as *Exhibit "1"*.

2. Official communication number 119-1900 dated June 6, 1996 issued by the General Director for Networks and Radiocommunication and by the General Coordinator for Planning and SCT Centers, both of The Ministry, copy of which you sent to me via fax on July 10, 1997.

In this document, the authority basically sets forth that the practice of some companies that without the required authorizations granted by the Federal Government, render international long distance telephone services using alternate call proceedings, such as the access through international 800 numbers, or "call back" systems, is against the legal provisions contained in the Federal Law on Telecommunications in view of the exclusivity granted in favor of Telmex until August 1996, for the rendering of the basic national and international long distance service.

3. Official communication dated April 20, 1995 issued by the General Director of the "Direcion General de Politicas y Normas de Comunicaciones" (General Bureau of Policies and Communication Rules) of The Ministry, addressed to Mr. Bradley Tirpak, Representative in Mexico of Access Telecomm, Inc., which I understand is Exhibit No. 71 to Bradley Tirpak's deposition.

In this last document the aforesaid administrative authority is saying in summary the following:

a). That the telephone service rendered by Telmex known as "Lada 800 Internacional" has its legal basis on the permit to operate and render aggregate value services inherent to the telephone service, granted in favor of such company on October 26, 1990.

b). That in accordance with clause 5-5 of The concession, Telmex is entitled to enter into interconnection agreements with networks of other countries, either by itself or through The Ministry, in the event that the contracting party is a Foreign Government.

c). That the reselling of the exceeding capacity of circuits contracted with Telmex is permitted, unless that such reselling is used to render basic long distance telephone services, in which case Telmex was not bound to render the service before August 10, 1996.

d). That as of the date of this official communication, MCI had not requested the opinion of The Ministry in connection with the reselling of capacity to render the basic long distance telephone service.

As a consequence of all the aforesaid, it can be affirmed that the long distance services provided in Mexico by LDI and ATI were illegal, since such foreign company had no concession to operate and exploit long distance services in Mexico, and did not have Telmex's specific authorization to use its telephone network for such purpose. Besides, the rates offered to the public by said plaintiff were not registered with or approved by The Ministry.

If Telmex had allowed or authorized the continuation of the illegal LDI's practice, without the previous permit or authorization by The Ministry, Telmex was in danger of incurring in a very serious event of default under The Concession.

See Declaration of Francisco Manzanero, filed on August 29, 1997 (Docket Entry No. 108), pp. 1-23 (emphasis in original).

VII. Analysis

The starting point to reaching an answer to the question of the legality or illegality of the service provided by ATI is deciding whether ATI was doing business in Mexico. If, as SBC and MCI contend, it was, then it was subject to the requirement that it first obtain authorization from Telmex to do so. However, if, as ATI insists, it was not doing business in Mexico, then ATI was free to provide its I-800 long distance service without first obtaining authorization from Telmex. For the reasons given below, the Court finds that ATI, by virtue of its I-800 long distance service, was engaged in business in Mexico and, consequently, was statutorily bound to obtain authorization from the SCT to do so.

ATI takes the position that it was not transacting business within Mexico through its I-800 service because that service only entailed it receiving the telephone calls from MCI at a switching point physically located within the United States and then routing the phone call on its lines to its final destination. Although this argument does have some initial appeal, it vanishes upon closer examination.

There is no dispute that ATI did not have a physical presence within the boundaries of Mexico. However, this does not dispose of the issue of whether it provided long distance services in Mexico. By ATI's own admission, it provided a service to residents of Mexico whereby they could dial a long-distance number that was originally carried on Telmex lines until it reached MCI at a switch point somewhere in the United States. MCI, in turn, relayed the call to ATI. When the call reached ATI, either a live operator or a voice-prompt computer asked the customer for his billing code and the number the customer in Mexico was trying to call. Once that information was received, the operator completed the call.

Although the Court is uncertain as to what appellation properly identifies ATI's service,[20] there is one thing as to which it is certain. That is the fact that no matter how ATI tries to fashion it, the service that it provided was a form of long distance service and the people it provided that service to were residents of Mexico. Although ATI attempts to focus the Court's attention on the physical aspects of the way the calls were transmitted and the absence of any physical presence by ATI in Mexico, the Court finds that this is not the proper point of inquiry. The critical point to the Court and one which ATI cannot deny, is that ATI provided a service to Mexican residents by which they could place long distance telephone calls from Mexico to points outside of Mexico. That ATI did not have its buildings, equipment, or people in Mexico is irrelevant. It still delivered a long distance service to residents of Mexico.

ATI having been found to be providing a long distance service to residents of Mexico at a time when Mexican regulatory law required it to have a permit or concession from the SCT to do so, it automatically follows that the failure of ATI to obtain such a permit or concession from the SCT for its long distance service rendered its operation unlawful under Mexican law.

Apparently in anticipation of this finding by the Court, ATI advances two theories of waiver of the permit requirement. First, it argues that Telmex waived the requirement by failing to include any restriction on the resell of its excess capacity in its service contracts with its users such as MCI. According to ATI, the absence of any ban on resell by the users meant that the users were free to resell the service to long distance pro-

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[20] The parties have squabbled about whether ATI's service was a "call back" service. Yet, despite submitting extensive briefs, neither party has bothered to define what a "call back" service is. However, as explained by the Court, the category of the long distance service is not crucial to resolving the issue.

vides such as ATI, regardless of whether they possessed a permit or concession from SCT.

The flaws in ATI's argument are several. First, it confuses the issue of whether or not a user could resell the service to a third party with the issue of whether the third party was required to have a permit or concession from the SCT. These are two entirely distinct and unrelated issues. The first concerns whether or not Telmex contractually prohibited its users such as MCI from reselling its excess capacity. If it did not, all this means is that the users had permission from Telmex to resell the service. However, it does not logically follow from this, as ATI seems to urge, that Telmex, by waiving its restriction on the resell of the excess capacity, somehow waived the SCT's requirement that the third-party user hold a concession or permit from the SCT. That is simply a *non sequitur*. ATI fails to explain, and this Court does not see how it would be possible for Telmex to waive this regulatory requirement. The only entity that could waive that provision would be the SCT, the Mexican regulatory agency responsible for the drafting and enforcement of regulations pertaining to the telecommunications industry in Mexico. ATI has presented no evidence that SCT could or ever did delegate that authority to Telmex. Therefore, this first waiver argument fails both as a matter of fact and law.

The other way by which the concession requirement was allegedly waived, ATI contends, was the acceptance of money by Telmex from MCI, a portion of which was the income derived by MCI from its contract with ATI. According to ATI, Telmex knew that part of the revenues it received from MCI was generated by MCI's resell of the long distance service bought from Telmex to ATI. Therefore, Telmex, by knowingly accepting the pecuniary benefit of income paid by ATI to MCI, implicitly consented to ATI's lease and use of the long distance service which Telmex had sold to MCI. This argument, like the first one advanced by ATI, misses the mark.

As was the case with ATI's other waiver argument, this waiver argument is based on the actions of Telmex. However, as previously noted, there is no evidence that Telmex had any legal right to waive the SCT concession requirement. The only evidence of record is that the SCT was the sole holder of that right. Therefore, whether or not Telmex may have accepted income from MCI which was derived from ATI's use of the long distance service it leased from MCI has no bearing on the issue of whether the requirement of a concession was ever waived by the SCT. ATI has not adduced any evidence that the SCT ever did so.[21]

CONCLUSION

Based on the above findings, the only conclusion that can be reached is that the provision of I-800 long distance telephone service to residents of Mexico by ATI without a concession from the SCT was not legal under Mexican law.

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[21] Brad Tirpak, president of ATI, claims in his affidavit that Alvarez Alonso, the director of Public Policy at SCT, stated in a letter to him that ATI's service was legal under Mexican law. However, ATI has failed to produce the letter as part of its supporting documents. The Court also notes that Tirpak does not state that Alonso told him that ATI's provision of the I-800 service without first obtaining a concession from SCT was legal.

Tirpak also claims that Jose Maria Rivas, the predecessor to Alonso, told him on three separate occasions that ATI's services were legal under Mexican law. Again, however, there is no assertion that Rivas ever told him that provision of the service without a concession from SCT was legal under Mexican law. Furthermore, as pointed out by the Court in its Order granting Telmex's Motion to Dismiss for Lack of Jurisdiction Over Its Person, Jose Rivas Moncayo testified at his deposition that he expressly told Tirpak that ATI must obtain a concession from the SCT in order for its service to be legal under Mexican law and that such a concession could not be obtained unless and until ATI had obtained Telmex's permission to provide long distance service in Mexico. Moncayo also testified that ATI was never issued a permit as long as he was the General Director of the Office of Communications Policies and Standards of the SCT. *See* Court Order of June 20, 1997 (Docket Entry No. 75), pp. 19-21.

Accordingly, it is ORDERED that the Plaintiff's Motion for Partial Summary Judgment be, and the same is hereby, DENIED.

SIGNED this the 5th day of August, 1998.

/s/ D. W. Suttle
D. W. SUTTLE
Senior United States District Judge

APPENDIX G

[Filed Jun 20 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-96-CA-1064

ACCESS TELECOM, INC.,

Plaintiff,

v.

MCI TELECOMMUNICATIONS CORP., MCI INTERNATIONAL, INC., SBC COMMUNICATIONS, INC., SBC INTERNATIONAL, INC., SBC INTERNATIONAL LATIN AMERICA, INC. AND TELEFONOS DE MEXICO,

Defendants.

ORDER

Pending before the Court is the Motion to Dismiss For Lack of Jurisdiction Over Its Person filed by defendant Telefonoes De Mexico S.A. de C.V. ("Telmex") on October 11, 1996, the Response filed by Plaintiff, Access Telecom, Inc. ("ATI") on October 25, 1996, the Supplement of Telmex to its Motion to Dismiss filed on April 10, 1997, the Supplementary Response filed by ATI to its Response filed on April 23, 1997, the reply filed by Telmex to ATI'S a Supplementary Response on May 7, 1997, the Advisory to the Court filed by ATI on May 9, 1997, the Addendum to ATI's Supplementary Response filed on May 16, 1997, the Supplement to the Evidentiary Brief in Support of ATI's Supplementary Response filed on May 16, 1997, the Response filed by Telmex to ATI's Advisory to the Court filed on May 19, 1997, and Objection and Supplement to Plaintiff's Response in Opposition

to Telmex's Motion to Dismiss for lack of Jurisdiction Over Its Person filed on May 27, 1997.[1]

I. History of the Case

This lawsuit was originally filed by ATI against Telmex and the other defendants in the 73rd Judicial District Court, Bexar County, Texas on September 10, 1996. Therein ATI alleges, *inter alia*, that Telmex conspired with MCI Telecommunications Corp. and MCI International, Inc. ("MCI") to eliminate all I-800 telephone services provided by ATI from Mexico to the United States. The causes of action alleged by ATI against Telmex are for intentional interference with a contract between ATI and one or more of the MCI defendants, intentional interference with a contractual or business relationship between ATI and potential new customers, violations of §15.05(a) and (b) of the Texas Free Enterprise and Antitrust Act of 1983, §15.01 *et seq.* TEX.BUS. & COMM. CODE ("the Texas Antitrust Act), and violations of antitrust laws of the United States as defined in 15 U.S.C. § 12.[2]

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[1] Docket Entry Nos. 6, 10, 59, 64, 65, 66, 67, 68, 69, and 70, respectively.

[2] Section 12 of Title 15, United States Code, provides as follows:

> (a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved February twelfth, nineteen hundred and thirteen; and also this Act.

On October 4, 1996, MCI filed its Notice of Removal[3] pursuant to 28 U.S.C. § 1331[4] and 1337.[5] SBC Communications Inc., and SBC, International Inc., and SBC International Latin America, Inc. filed a similar notice of removal that same

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"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the law of any of the Territories, the laws of any State, or the laws of any foreign country.

(b) This Act may be cited as the "Clayton Act".

The Acts referred to in §12 are the Sherman Act, 15 U.S.C. §§ 1-7, the Wilson Tariff Act, 15 U.S.C. §§ 8-11, and Act February 12, 1913, c. 40, 37 Stat. 667, as amended, which is classified to sections 8 and 11 of Title 15.

[3] Docket Entry No. 1.

[4] Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

[5] Section 1337 provides in pertinent part as follows:

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however*, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

day.[6] Telmex and MCI filed their joinder in that removal the same day.[7]

II. Argument and Analysis

A. *Go-Video "National Minimum Contacts" Analysis Applicable?*

The initial argument advanced by ATI is that because Telmex is alleged to have violated the Clayton Act, which provides for worldwide service of process, this Court has personal jurisdiction over Telmex if Telmex has sufficient minimum contacts with the United States, citing *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 855 F.2d 1406 (9th Cir. 1989) and other cases. Telmex, while acknowledging that this is the law in the Fifth Circuit argues that this analysis is not warranted in the instant case because ATI's antitrust violations all concern alleged efforts by Telmex to monopolize the I-800 telephone service in Mexico. Therefore, Telmex asserts, because the anti-trust laws of the United States do not regulate or redress allegedly monopolistic conduct in foreign countries by foreign companies, ATI does not have the requisite anti-trust claims needed to warrant utilization of the analysis. Instead, it must establish that Telmex is subject to either the specific personal jurisdiction or general personal jurisdiction of Texas courts under the traditional *International Shoe*[8] analysis.

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[6] Docket Entry No. 4.

[7] Docket Entry Nos. 2 and 3, respectively.

[8] *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). In *International Shoe*, the Supreme Court held that exercising personal jurisdiction over a nonresident does not violate due process principles if two requirements are satisfied. First, the nonresident defendant must have purposefully availed himself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state. 326 U.S. at 316, 66 S.Ct. at 158. Second, the exercise of jurisdiction over the nonresident defendant must not offend "traditional notions of fair play and substantial justice." *Id.*

Naturally, resolution of this issue begins with an examination of ATI's antitrust allegation against Telmex.

ATI's amended complaint alleges, in pertinent part, as follows:

> 11. During or before 1992, TELMEX entered into an agreement with MCI INTERNATIONAL, INC. to provide international 800 (I-800) service from Mexico to the United States. MCI INTERNATIONAL, INC. provided this service to MCI TELECOMMUNICATIONS CORP. during and since 1992. MCI TELECOMMUNICATIONS CORP. advertised and offered for sale to its customers I-800 service for calls originating from Mexico, based on the services provided by TELMEX.
>
> 12. During 1993 and 1994, ATI contracted with MCI TELECOMMUNICATIONS CORP. for I-800 services from Mexico for itself and as agent for various customers. In addition to the I-800 service from Mexico, ATI offered a switching service carried out in Texas and elsewhere in the United States whereby customers could complete calls to a variety of U.S. 800 and other telephone numbers from Mexico. MCI represented to ATI that it had the authority and capacity to contract for telephone services through TELMEX between Mexico and the United States; that the proposed activity by ATI was within the terms of the tariff and in all respects a legal reuse of the services provided; that services would continue under the same legal terms in the future; that the rights and obligations of the parties under the contract were enforceable and that MCI would provide the same services in the future with special accommodations to ATI as its business increased. These and other promises and representations induced ATI to enter into an agreement with MCI and were a producing cause of damages to ATI.

13. The services offered by ATI used and paid for the use of TELMEX lines provided to MCI INTERNATIONAL INC. then to MCI TELECOMMUNICATIONS CORP. which were then sold under contract to ATI. Customers of ATI could save money on voice and facsimile calls between their Mexican offices and offices in the United States by the use of these services.

14. ATI expanded its business rapidly during 1994 and reached a revenue volume in excess of two million dollars per year. During middle and late 1994, TELMEX and/or SBC began a campaign to eliminate ATI as a source of potential competition, notwithstanding that the I-800 services offered by ATI were those very same services offered by MCI and that TELMEX was paid for each and every telephone call made through ATI. The auxiliary switching services offered by ATI allowed expanded use of the U.S. telephone system but all of these services were conducted within Texas and the United States.

15. During 1994, TELMEX and/or SEC demanded that MCI provide lists of its customers that were reselling the MCI I-800 services provided through TELMEX. The resale of the I-800 service offered by MCI was specifically authorized under the contract with ATI and under the MCI tariff. Eventually MCI provided a list of customers including ATI and its customers, whether or not ATI acted directly or only as agent for the customers under a letter of agency. MCI TELECOMMUNICATIONS CORP. and MCI INTERNATIONAL, INC. agreed and conspired with TELMEX and/or SBC to eliminate ATI as a potential source of competition by restraining its access to telephone communications completely, with regard to I-800 service from Mexico, which constituted the entire business of ATI.

* * * *

38. The conduct of TELMEX and/or SBC further constitutes:

a. a contract, combination in the form of trust or otherwise, and/or a conspiracy in restraint of trade or commerce among the several states or with foreign nations; and/or

b. a monopoly, or attempt to monopolize, and/or a combination or conspiracy to monopolize a part of the trade or commerce among the several states, or with foreign nations.

Such conduct is in violation of the Anti-Trust laws of the United States as defined in 15 U.S.C. §12.

See ATI's First Amended Complaint, pp. 3-8. Although ATI does not specifically cite them, the Court reads ATI's allegation as one for violations of Section 1[9] and 2[10] of the Sherman Act.

Section 1 of the Sherman Act prohibits conspiracy "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Section 2 of the Sherman Act prohibits monopolization and attempted monopolization "of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. Although the Sherman Act applies to trade and commerce with foreign nations, it applies to foreign anti-trust conduct only to the extent that said conduct produces "some substantial effect in the United States." *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796, 113 S.Ct. 2891, 2809, 125 L.Ed.2d 612 (1993). Specifically, pursuant to § 6a of the Sherman Act, anti-trust conduct involving United States export commerce with foreign nations is actionable only if said conduct has a "direct, substantial, and

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[9] 15 U.S.C. §1.

[10] 15 U.S.C. §2.

reasonably foreseeable effect" on one of the following: (1) on United States domestic commerce; (2) on United States import commerce; and (3) on export commerce only to the extent that such conduct injures export business in the United States. 15 U.S.C. § 6a.

As Telmex points out, all the activities of Telmex of which ATI complains occurred outside the United States. Moreover, the market from which ATI alleges to have been excluded by Telmex is the I-800 service market in Mexico, outside the United States. Neither the fact that ATI is an American corporation nor that SBC and MCI are American corporations provide the requisite nexus with American trade that would bring the alleged illegal activity within the purview of the Sherman Act. See *Power East Limited v. Transamerica Delaval Inc.*, 558 F.Supp. 47, 49 S.D.N.Y. (1983) (Sherman Act claim of plaintiff, a Cyprus corporation, failed to state cause of action, where activities complained of all occurred outside United States, market from which plaintiff was supposedly excluded was outside the United States, and plaintiff made no suggestion of a "relevant market" in United States nor mentioned any American competitors; fact that principal shareholder of plaintiff was United States citizen and one of the defendants was a corporation organized within United States did not provide requisite nexus with American trade that would bring alleged illegal activity within purview of Sherman Act). *See also Optimum v. Legent Corporation*, 926 F.Supp. 530 (W.D..Pa. 1996) (holding that foreign corporation which marketed and distributed computer software products of American corporation in Argentina failed to establish that termination of its marketing contract by another foreign corporation resulted in anticompetive effect on United States' domestic commerce, and thus district court lacked subject matter jurisdiction over corporate distributor's claim that termination of marketing contract violated Sherman Act; allegation that income flowed between corporations was insufficient to establish requisite domestic effect and distributor, a

foreign corporation, could not maintain action under Sherman Act based merely upon injury to United States exporters attempting to enter Argentine computer software market).

As observed by the Court of Appeals for the Tenth Circuit:

> The principal purposes of the antitrust laws are protection of American consumers and American export and investment opportunities. If American interests are at stake we may impose liability for conduct outside our borders that has consequences within our borders. See *Alcoa*, 148 F.2d at 443. When the contacts with the United States are few, the effects upon American commerce minimal, and the foreign elements overwhelming, however, we do not accept jurisdiction. We believe that the analysis set forth in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d at 613-15, contains the proper elements for consideration. To support jurisdiction of American court, plaintiff must first show that the challenged activity had an actual effect on United States commerce. Then we must decide if "the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Id.* at 613.

Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869 (10th Cir. 1981). In short, the antitrust laws of the United States do not regulate the competitive conditions of other nations' economies. *Matushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). *See also Industrial Inv. Develop. Corp. v. Mitsui & Co.*, 671 F.2d 876, 883 (5th Cir. 1982) (district court should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity, conflicts of law or international law).

In view of the fact that the conduct of Telmex all occurred in Mexico, that the market from which ATI claims to have been excluded is the I-800 service market in Mexico, and that the resultant economic consequences are felt predominately by Mexican consumers, the Court finds it does not have subject matter jurisdiction of ATI's antitrust claims against Telmex. Consequently, ATI must establish that this Court enjoys personal jurisdiction over Telmex under the more restrictive analysis of *International Shoe*.

B. *International Shoe "Minimum Contacts" Analysis*

This Court has personal jurisdiction over a nonresident defendant to the same extent that a Texas state court has such jurisdiction. *Bullion v. Gillespie*, 895 F.2d 213, 215 (5th Cir. 1990); Federal Rules of Civil Procedure, Rule 4 (e). The reach of this jurisdiction is delimited by: (1) the state's long-arm statute; and (2) the Due Process Clause of the Fourteenth Amendment to the federal Constitution. *Bullion*, 895 F.2d at 215. Because the Texas long-arm statute extends to the limits of federal due process,[11] the two-step inquiry is reduced to determining whether requiring Telmex to defend this lawsuit in Texas would encroach on its individual liberty interests—not to be subjected to suits in a distant forum with which it has little connection-that are safeguarded by the Due Process Clause.[12]

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[11] The Texas long-arm statute, Tex.Civ.Prac. & Rem. Code. Ann. §17.042 (Vernon 1986), authorizes the exercise jurisdiction over nonresidents "doing business" in Texas. The Texas Supreme Court has interpreted the "doing business" requirement broadly, allowing the long-arm statute to reach as far as the federal Constitution permits. *Schlobohm v. Schapiro*, 784 S. W. 2d 355, 357 (Tex. 1990).

[12] The Due Process Clause provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, §1.

Exercising personal jurisdiction over a nonresident does not violate due process principles if two requirements are satisfied. First, the nonresident defendant must have purposefully availed himself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state. *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir.), *cert. denied*,—U.S.—, 115 S.Ct. 322, 130 L.Ed.2d 282 (1994) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). Second, the exercise of jurisdiction over the nonresident defendant must not offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987) (citing *International Shoe*, 326 U.S. at 316, 66 S.Ct. at 158).

The "minimum contacts" prong of this inquiry can be further subdivided into contacts that give rise to "specific" personal jurisdiction and those that give rise to "general" personal jurisdiction. Specific jurisdiction exists when the nonresident defendant's contacts with the forum state arise from, or are directly related to, the cause of action. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8, 104 S.Ct. 1868, 1872 n. 8, 80 L.Ed.2d 404 (1984). General jurisdiction, on the other hand, will attach, even if the nonresident defendant's contacts with the forum state are not directly related to the cause of action, if the defendant's contacts with the forum state are both "continuous and systematic." *Helicopteros*, 466 U.S. at 414 n. 9, 104 S.Ct. at 1872 n. 9. In evaluating these contacts, it must be determined whether the defendant purposefully availed himself of the privilege of conducting activity in the forum state, thereby enjoying the benefits and protection of the forum's laws. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985).

If a nonresident defendant is found to have sufficient related or unrelated minimum contacts with the forum state, the

Court must then ascertain whether the "fairness" prong of the inquiry is met. *See Asahi*, 480 U.S. at 105, 107 S.Ct. at 1033. The "fairness" of requiring a nonresident to defend a suit in a remote forum is a function of several factors, including the "interests of the forum State."[13] *Asahi*, 480 U.S. at 113, 107 S.Ct. at 1033.

When, as here, a nonresident defendant files a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing this Court's jurisdiction over the nonresident. *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985). When the motion was ruled on without a hearing, the plaintiff may bear his burden by presenting a *prima facie* case that personal jurisdiction is proper. *Wilson*, 20 F.3d at 648. "Moreover, on a motion to dismiss for lack of jurisdiction, uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor for purposes of determining whether a *prima facie* case for personal jurisdiction exists." *Felch v. Transportes Lar-Mex, S.A., de C.V.*, 92 F.3d 320, 326 (5th Cir. 1996) *(quoting Bullion*, 895 F.2d at 217). In the event the Court finds that the defendant purposefully established sufficient minimum contacts with the forum, then the burden shifts to the defendant to present a "compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2.84-85.

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[13] The factors to be considered in the fairness inquiry are: (1) [T]he burden upon the nonresident defendant; (2) the interests of the forum state; 3) the plaintiff's interest in securing relief; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (5) "the shared interest of the several States in furthering fundamental substantive social policies." *Bullion*, 895 F.2d at 216 n. 5 (citing *Asahi*, 480 U.S. at 113, 107 S.Ct. at 1033 (quoting *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 563, 62 L.Ed.2d 490 (1980)).

i. The Collateral Estoppel or Res Judicata Effect of the State Court Ruling

The first matter that this Court must address is whether Telmex is precluded from litigating the personal jurisdiction issue before this federal tribunal by an order of a Texas state court denying Telmex's special appearance.

In its letter advisory to the Court[14] ATI advances the argument that an order by the 37th Judicial District Court, Bexar County, Texas denying Telmex's special appearance to contest jurisdiction in an action styled *Long Distance International, Inc., and Star Marketing Service, Inc. v. Telefonos de Mexico, S.A., et al*, NO. 96-CI-08912, is *res judicata* as to the issue of whether a Texas court enjoys general jurisdiction over Telmex and that Telmex is precluded from relitigating the issue in this case by the doctrine of collateral estoppel. Telmex responds that because the order denying its special appearance is an interlocutory order not subject to immediate appeal it is not a judgment for purposes of *res judicata* or collateral estoppel. Consequently, Telmex argues, it does not bar Telmex from litigating the issue of jurisdiction before this Court. As explained below, the Court finds ATI's argument untenable.

As both parties recognize, federal courts are required to give the same preclusive effect to state court judgments that such judgments would be afforded in the courts of the state from which the judgment originated. *Deckert v. Wachovia Student Financial Services, Inc.*, 963 F.2d 816, 817 (5th Cir. 1992) (citing *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 466, 102 S.Ct. 1883, 1889-90, 72 L.Ed.2d 262 (1982); *Superior Oil Co. v. City of Port Arthur*, 726 F.2d 203, 206 (5th Cir. 1984), quoting *Kremer, supra; Folsom Inv. Co. v. Moore*, 681 F.2d 1032, 1035 (5th Cir. 1982); *Coastal States Marketing v. Hunt*, 694 F.2d 1358, 1373 (5th Cir. 1983) (cita-

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[14] Docket Entry No. 66.

tions omitted)). Therefore, the next analytical step is to examine the preclusive effect of the state court's order denying Telmex's special appearance.

Under Texas law " [t]he doctrine of res judicata states that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal." *Texas Water Rights Commission v. Crow Iron Works*, 582 S.W.2d 768, 771 (Tex. 1979). "The doctrine of collateral estoppel differs in that it precludes relitigation of only those issues actually and finally decided in a prior action." *Hanrick v. Gurley*, 93 Tex. 458, 56 S.W. 330 (Tex. 1900).

Based on the above definitions, it is obvious that the state court order denying Telmex's motion to dismiss for lack of *in personam* jurisdiction does not satisfy the requirements necessary for application of the doctrine of *res judicata*. As Telmex points out, the state court order is an interlocutory order which only finds that the state court has jurisdiction over Telmex, not a judgment which passes on the merits of the causes of action asserted against Telmex. As such, it is not immediately appealable. See *Canadian Helicopters Ltd. v. Witting*, 876 S.W.2d 304, 307 (Tex. 1994) (because in the ordinary case no circumstances apart from the increased cost and delay of trial and appeal are present, mandamus typically will not lie from the denial of a special appearance). Therefore, Telmex is not precluded by the doctrine of *res judicata* from litigating the personal jurisdiction issue in this tribunal.

Having ruled out preclusion on the basis of res *judicata*, the Court must next determine whether the doctrine of collateral estoppel applies. In Texas, relitigation of an issue will be barred by collateral estoppel if "(1) the facts sought to be litigated in the first action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in

the first action; and (3) the parties were cast as adversaries in the first action." *Mower v. Boyer*, 811 S.W.2d 560, 563 (Tex. 1991) (quoting *Eagle Properties v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1991); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984)). However, a prior adjudication of an issue will be given estoppel effect only if it was adequately deliberated and firm. The factors to be considered in making this determination are (1) whether the parties were fully heard, (2) that the court supported its decision with a reasoned opinion, and (3) that the decision was subject to appeal or was in fact reviewed on appeal. *Mower*, 811 S.W.2d at 562 (citing *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex . 1986); *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 385 (Tex. 1985); Restatement (Second) of Judgments §13, comment g (1982)).

As already mentioned, the state court's order is an interlocutory one which is not immediately appealable. Moreover, the order is not supported by a reasoned decision. In fact, the state court cites no specific reason in support of its ruling, but instead recites a general, non-specific litany for denying, Telmex's motion.[15] Finally, ATI is not a party to the state court action from which the order emanated. Consequently,

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[15] The state court order reads in its entirety as follows:

On Wednesday, April 30, 1997, the Court considered defendant TELEFONOS DE MEXICO, S.A.'s special appearance. After considering the pleadings, the special appearance (sic), the response, affidavits, stipulations, and discovery on file, the arguments of counsel, and, after a hearing on the special appearance and receiving evidence, the court

OVERRULES defendants special appearance and retains plaintiff's suit against TELEFONOS DE MEXICO, S.A. on the court's docket.

See Order on Defendant Telefonos De Mexico, S.A.S. Special Appearance, attached as Exhibit 4 to ATI's Letter Advisory to the Court (Docket Entry No. 66).

the order fails to satisfy two of the three elements essential to finding that it has collateral estoppel effect in the instant action.[16]

Accordingly, the Court finds that the state court order denying Telmex's special appearance does not act to collaterally estop Telmex from contesting the issue of whether this Court enjoys jurisdiction over its person in this action.

Having determined that the Texas state court order denying Telmex's special appearance does not fall under the doctrine of *res judicata* or the doctrine of collateral estoppel, the Court considers whether Telmex is amenable to the special or general personal jurisdiction of a Texas court.

ii. Specific Personal Jurisdiction

ATI contends that this Court has special personal jurisdiction for one reason. Specifically, ATI argues that Telmex purposely and wrongfully engaged in a course of conduct with MCI for the purpose of eliminating ATI from competition in the I-800 service in Mexico and that this intentional tort by Telmex caused damage to ATI in Texas by putting ATI out of business. Telmex counters that because everything it did was lawful under Mexican law no tort occurred, either in whole or in part, in Texas.

As support for its position, Telmex cites portions of the testimony given by Jose Rivas Moncayo at his oral deposition. Moncayo, who was, at all relevant times, the General Director of the Office of Communications Policies and Standards of

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[16] The Court also notes another dissimilarity between a special appearance in state court and the instant motion to dismiss for lack of personal jurisdiction. In the state court, a defendant seeking a special appearance pursuant to state Rule 120a, has the burden of proving a lack of jurisdiction. On the other hand, in federal court the burden of proof is on the party seeking to acquire jurisdiction. *Lapeyrouse v. Texaco, Inc.*, 693 F.2d 581, 583 n. 3 (5th Cir. 1982).

the Ministry of Communication and Transportation,[17] testified as follows:

> Q. Under the legal nature and complementary law you described, did Access Telecom, Incorporated have authorization to offer international telephone service in Mexico?
>
> A. No, they did not have it.
>
> Q. Because Access Telecom, Incorporated did not have authorization from Telefonos de Mexico to offer international telephone services, would their offering of international telephone service in 'Mexico be a violation of Mexican law?
>
> TRANSLATOR: A violation of what?
>
> MS. BURCHUCK: Mexican law.
>
> A. It was illegal to give those services.

Dep. of Jose Rivas Moncayo, p. 14.

> Q. During the relevant period, Access Telecom was not authorized to offer international telephone service in Mexico; was it?
>
> A. They were not authorized.
>
> TRANSLATOR: That's the answer.
>
> BY MS. BURCHUK:
>
> Q. Since Access Telecom was not authorized, was—

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[17] *See* Deposition of Jose Rivas Moncayo, p. 7, lines 1-20, attached as Ex. "C" to ATI's Response. That agency is the Mexican government's equivalent to the United States Federal Communications Commission. *See* Deposition of John H. Atterbury, p. 25, lines 8-21, attached as Ex. "B" to ATI's Response' to Telmex's Motion to Dismiss for Lack of Jurisdiction (Docket Entry No. 10).

JUDGE JARAMILLO: Do you mind repeating your question?

MS. BURCHUK: Sure.

BY MS. BURCHUK: Since Access Telecom was not authorized to offer international telephone service in Mexico, if it offered those services, would it have been engaging in a practice illegal in Mexico?

A. Yes, in fact. It's a fact.

Id., p. 19, line 22-p. 20, line 12.

Q. Did you meet with Mr. Tirpak when you were the general director of the office of communication policies and standards?

A. Yes, I did. I did.

Q. During your meeting with Mr. Tirpak, did he describe the services offered by Access Telecom, Incorporated?

A. I suppose he did because they were requesting a permit in order to do so.

Q. Do you recall how he described Access Telecom's services?

A. In fact, it was the same nature as a service named in telecommunications is called call-back.

Q. By same nature, do you mean a service offered by a company that was not authorized to offer international telephone service in Mexico?

A. That person went because he wanted to get a permit for that service. I did not give the permit. Stated that he should go to Telmex to come to an agreement with them. Otherwise it would be impossible.

MS. BURCHUK: I'm going to need you to answer the question that I asked before and the court reporter will read it back.

(Following question read by reporter. By same nature, do you mean a service offered by a company that was not authorized to offer international telephone service in Mexico?)

A. Yes, it's a service which was not authorized.

Id., p. 23, line 3-24; p. 24, 1-9.

Q. Do you recall making any statements to Mr. Tirpak, from which he would have concluded that Access Telecom had not broken any current Mexican law or regulations?

A. I remember having told him that he was a violating a law and the procedure in order to get a permit was through a previous agreement with Telmex. If he could show me that agreement, I could give him the permit; and that never happened.

Id., p. 27, lines 13-21.

Q. I hope so. Should be. In your last answer you stated that a company had to be authorized to resale Telefonos de Mexico service. Did Access Telecom ever receive this authorization?

A. They never received it. While I was the person responsible, they never received it. They never granted a permit for long distance service while I was responsible.

Q. Was that during the time you were director general?

A. Obviously, yes.

Id., p. 32, lines 2-11.

ATI has proffered no evidence to discredit Moncayo or refute his testimony that Mexican law prohibits ATI from entering the I-800 telephone service in Mexico without first obtaining authorization from Telmex to do so. Therefore, the Court must accept Moncayo's testimony as true. In so doing, the Court not only finds that ATI could not, under Mexican law, enter the I-800 telephone service market in Mexico without first obtaining authorization from Telmex, but that any attempt by ATI to do so, whether directly or indirectly by contracting with MCI, was in violation of Mexican law.

As noted earlier, ATI's tort claim against Telmex is one for tortious interference with ATI's contract with MCI for resale of I-800 telephone service MCI had purchased from Telmex. Under Texas law, a plaintiff establishes a case of wrongful interference with a contract by showing that: (1) a contract existed that is subject to interference; (2) the act of interference was willful and intentional; (3) such intentional act was a proximate cause of the plaintiff's damages; and (4) actual damage or loss occurred. *Central Savings and Loan Association*, 848 S.W.2d 232, 241. (Tex.App.—Dallas 1992; no writ) (citing *Futerfas v. Park Towers*, 707 S.W.2d 149, 161. (Tex.App.—Dallas 1986, writ ref'd n.r.e.)). The general rule is that for there to be a right of action against one for contractual interference, there must be in existence a valid contract. *Spellman v. Lyons Petroleum, Inc.*, 709 S.W.2d 295, 298 (Tex.App—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (citing *Armendariz v. Mora*, 553 S.W.2d 400, 404 (Tex.Civ.App.—El Paso 1977, writ ref'd n.r.e.)). There is no remedy for tortious interference with a contract contrary to law and public policy. *Ben E. Keith Co. v. Lisle Todd Leasing, Inc.*, 734 S.W.2d 725, 727 (Tex.App.—Dallas 1987, writ ref'd n.r.e.). *See also Crowder v. Benchmark Bank*, 889 S.W.2d 525 (Tex.App.—Dallas 1994) (Texas courts do not enforce illegal contracts), *modified on other grounds*, 919 S.W.2d 657 (Tex. 1996). In light of the Court's finding that Mexican law does not allow ATI to repurchase the I-800 ser-

vice from MCI or anyone else without first obtaining Telmex's permission to do so and that ATI never obtained such authorization from Telmex, ATI is unable to establish the existence of a valid contract which this Court can enforce.

Accordingly, the Court finds that it does not enjoy specific personal jurisdiction over Telmex.

iii. General Personal Jurisdiction

Specific personal jurisdiction over Telmex having been eliminated, the Court is left only with the question of whether Telmex is subject to its general personal jurisdiction. ATI submits that the following systematic and continuous contacts by Telmex with Texas render it amenable to the general personal jurisdiction of a Texas court:

1. Ten percent of Telmex is owned by Southwestern Bell Corporation (SBC), a Texas corporation, through a subsidiary.

2. At least one member of the board of directors of Telmex, John Atterbury, is a United States citizen and is domiciled in Texas.

3. Telmex began providing telephone service between Dallas, Texas and Mexico pursuant to a contract it signed with AT&T in 1977, which was a continuation of an agreement entered into by the two companies in 1952.

4. In 1967, Telmex began to lease telephone lines and telephone circuits (normally 24 lines) between Nogales, Arizona and El Paso, Texas, an arrangement which continued and expanded through 1975.

5. In 1989, Telmex began leasing telephone circuits from MCI in the United States from the Texas border at El Paso, McAllen and Laredo to Manahawkin, Philadelphia, and Miami.

6. Beginning in 1967, Telmex leased telephone circuits to American companies including 98 voice grade circuits from the United States, through Mexico, to Guatemala.

7. Starting in 1993, Telmex began purchasing consulting services from its partner SBIH, a subsidiary of SBC communications, which is a Texas corporation.

8. Telmex has an existing correspondent relationship with MCI pursuant to which MCI sells regular phone service, I-800 service and private line service for Telmex in Texas.

9. SBC, Telmex's partner in Texas, specifically agreed to be held liable by United States courts for certain actions of Telmex when purchasing the company in accordance with an order of the U.S. District Court for the District of Columbia. Also, Telmex agreed to abide by the order of that Court so as to allow SEC and its partnership to purchase a controlling interest in the voting shares of Telmex.

10. When Telmex took SBC as a partner it implicitly agreed to the Modified Final Judgment of Judge Green by changing its articles of incorporation and further agreed to abide by the orders of the U.S. District Court.

11. Telmex has leased property, paid taxes and owned personal property in Texas.

12. Telmex's telecommunications lines cross into Texas and terminate on the border in Laredo and McAllen.

13. Telmex receives a large amount of its revenues from the provision of I-800 services to Texas residents.

14. Starting in 1993, Telmex has purchased consulting services from its partner Southwestern Bell Interna-

tional Holdings (SBIH), a subsidiary of SBC communications, a Texas corporation.

With regard to the leasing of property and paying of taxes in Texas, the lease[18] to which ATI refers was executed by Telmex in June of 1995. Likewise, the taxes were paid in 1996.[19] The events giving rise to the instant lawsuit occurred, according to ATI's First Amended Complaint, in 1994. Therefore, that transaction cannot be relied on by ATI for purposes of establishing that Telmex had sufficient minimum contacts with Texas so as to make it amenable to the jurisdiction of Texas courts prior to the events giving rise to the instant lawsuit. See, e.g., *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 913 (9th Cir. 1990) (in personal jurisdiction analysis, "[o]nly contacts occurring prior to the event causing the litigation may be considered); *Toshiba Funding Authority Ltd. v. Somerset Marine*, 923 F.Supp. 982, 986 (S.D.Tex. 1996).

With regard to its reliance on Telmex's entering into a consulting agreement with SBIH from 1991-1995, ATI fails to show how this constitutes the systematic and continuous contacts with Texas necessary to assert general personal jurisdiction over Telmex. As evidenced by the contracts themselves, SBIH is a Delaware corporation with its principal place of business in Wilmington, Delaware.[20] That SBIH is a subsidiary of SBC, a Texas corporation, is an inadequate basis for finding that Telmex, by hiring SBIH as its consultant, had contacts with Texas.

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[18] *See* Evidentiary Brief in Support of ATI's Supplementary Response to Telmex's Motion to Dismiss (Docket Entry No. 64) (hereinafter "Evid. Br."), Tab 36.

[19] Evid. Br., Tab. 37.

[20] Evid. Br., Tab 26a-26h.

Next, ATI asserts that Telmex, by entering into contracts with Sprint, MCI,[21] AT&T,[22] and IDB,[23] pursuant to which Telmex agreed to provide telecommunication services to and from the Mexico-Texas border, served to create a principal and agent relationship between Telmex and MCI, Sprint and AT&T in which MCI, Sprint and AT&T act as agents for Telmex within Texas, citing *Garver v. Howard*, 113 Tex. 371, 257 S.W. 209 (1923) and *Farmers State Bank in Merkel v. U.S.*, 62 F.2d 178 (5th Cir. 1932) as support. Consequently, ATI argues, Telmex has the requisite systematic and continuous contacts with Texas for this Court to assert its general personal jurisdiction over Telmex.

Telmex responds that these contracts merely allow Telmex to interconnect with the United States carriers to allow them to utilize Telmex's network in Mexico to complete calls in Mexico and vice versa. As explained below, this Court finds that Telmex does not have systematic and continuous contacts with Texas by virtue of these corresponding agreements.

As Telmex points out, all the correspondent agreements it has with Sprint, MCI, AT&T and IDB merely provide that Telmex will transmit incoming calls from the United States into Mexico via equipment that switches the incoming calls from the lines of the American carrier to Telmex's networks and, conversely, that the American carriers will perform the same service for outgoing calls from Mexico into the United States. ATI has offered no evidence that these corresponding agreements call for any of the American carriers to act as

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[21] The corresponding agreements with MCI and Sprint have been in effect since 1990. See Evid. Br. Tab 16 and Tab 14, respectively.

[22] The corresponding agreement with AT&T has been in effect since 1952. *See* Evid. Br., Tab 8.

[23] The Court is unable to locate the corresponding agreement between Telmex and IDB among the exhibits attached to the Evidentiary Brief of ATI.

Telmex's agent within Texas or the United States. As for ATI's reliance on *Garver* and *Farmers' State Bank in Merkel*, the Court finds such reliance misplaced.

In *Garver*, the San Antonio Grain Company sued Louis Garver, to whom it had sold a car of corn, State Bank & Trust Company, to whom it had delivered a draft drawn on Garver and a bill of lading for collection, and Continental State Bank, to whom State Bank had forwarded the papers for collection, to collect on the unpaid draft. The question of law certified to the Texas Supreme Court by the Court of Civil Appeals was, as framed by the Texas Supreme Court, "[w]hether, under the facts stated, the Continental State Bank was the agent of the State Bank & Trust Company (the forwarding bank), or of the owner of the paper (San Antonio Grain Company), or, abstractly stated, whether a correspondent bank, to which another bank has sent a customer's negotiable paper for collection, is the agent of the forwarding bank or of the owner of the paper, and whether the forwarding bank may be held for the negligence of its correspondent bank." *Garver*, 257 S.W. at 210. Based on the reasoning in *Tillman County Bank of Grandfield, Okl. v. Dell Behringer*,[24] another case decided by it the same day, the Supreme Court answered the question in the negative. *Id.* ATI fails to explain how this holding, which was concerned with determining whether or not a principal-agent relationship arose between a forwarding bank and a correspondent bank to whom the correspondent bank transferred a customer's negotiable papers for collection, has relevance to the facts of this case. Here, the only evidence is that Telmex, pursuant to the correspondent contracts, pays the American carriers a portion of the moneys it collects from its

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[24] In *Behringer*, the Texas Supreme Court held that a correspondent bank, to which another bank has forwarded a customer's negotiable papers for collection, is an agent of the owner of the paper and not of the forwarding bank, and the correspondent bank's negligence does not render the forwarding bank liable to the owner of the paper. 257 S.W. 206.

I-800 customers in Mexico for carrying the I-800 calls from the Mexico-Texas border to the receiving customer in the United States. In fact, if one were to view the Mexican customers, Telmex and the American carriers in terms of the bank customers, the forwarding bank, and the correspondent bank, respectively, involved in *Garver* and applied the rationale and holding of that case, then the American carriers (correspondent banks) would be the agents of the Mexican customers (bank customers), not of Telmex (the forwarding bank). *See also Philadelphia & R.R. Co. v. McKibbin*, 243 U.S. 264, 37 S.Ct. 280, 61 L.Ed. 710 (1917) (a railroad company no part of whose tracks enter a state is not doing business therein merely because of the fact that its cars are shipped back and forth in and out of the state over the lines of a connecting carrier on coupon tickets issued by the initial carrier, the revenue from which is proportionately divided).

Accordingly, the Court finds that Telmex has not had, by virtue of its correspondent contracts with AT&T, Sprint and MCI, systematic and continuous contracts with Texas so as to render it amenable to the general personal jurisdiction of a Texas court.

ATI next asserts that Telmex is subject to the general jurisdiction of Texas by reason of it having contracted with Housley Communications, a Texas corporation, for delivery of telephone poles and by storing the poles in Laredo, Texas. Telmex responds that ATI has offered no evidence that the poles were stored in Laredo at the request of Telmex. Moreover, this purchase was a single event and therefore cannot serve as a basis for asserting general personal jurisdiction over it.

Initially, the Court notes that ATI's reference to the transcript of the oral deposition of Alejandro Coca Sanchez as Tab 27 is incorrect. Tab 27 is the transcript of the deposition of Armando Corona Perez. The transcript of the Sanchez deposition is attached as Tab 35. Furthermore, the document

attached as Tab 28 is not the agreement between Telmex and BMF for the purchase of the telephone poles, but instead is an escrow agreement entered into between Telmex and World Trading Corp of Houston, Inc. concerning the settlement of a dispute over the telephone poles. The "Agreement" referred to in Section 5 of that document is the escrow agreement, not the purchase agreement for the telephone poles.

As far as this Court can ascertain from its review of the cited portions of the Perez deposition transcript, Telmex purchased approximately 75,000 telephone poles from BMF Corporation in 1990.[25] Apparently, the poles were later stored in Laredo, Texas. However, there is no evidence that this Court can find to indicate who directed that the poles be stored in Laredo. As Telmex points out, Perez stated in his deposition that he himself did not know if the poles had been stored in Laredo. Furthermore, although the attorney questioning Perez refers to the purchase agreement between Telmex and World Trading as Exhibit No. 5 in questioning Perez as to the storage of the poles in Laredo, the document attached as Exhibit 5 to the Perez deposition[26] is not the purchase agreement. Instead, it is the escrow agreement mentioned by the Court in the above paragraph. Given this, the Court finds that the one time purchase of telephone poles by Telmex is not enough to invoke the general personal jurisdiction of this Court.

ATI next attempts to establish general personal jurisdiction over Telmex on the ground that John Atterbury, one of the members of the board of directors of Telmex, is a United

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[25] *See* Evid. Br., Tab 27, the Oral Deposition of Armando Corona Perez, pp. 18-22, and Tab 28, the escrow agreement between Telmex and World Trading Corp. of Houston, Inc. Apparently, World Trading Corp. of Houston, Inc., a Texas corporation, succeeded to BMF's interest.

[26] This document is labeled as Tab 28 in the exhibits attached to ATI's evidentiary brief.

States citizen and is domiciled in Texas. However, the mere presence of officers or agents of a foreign corporation within the state is not sufficient to constitute a doing of business for purposes of jurisdiction. *See Turner v. Jack Tar Grand Bahama, Ltd.*, 353. F.2d 954 (5th Cir. 1965) (mere residence of officers and directors of foreign corporation in Texas, together with holding of conferences in that state regarding foreign corporation's business operations, insufficient to prevent application of rule that solicitation alone is insufficient basis for in personam jurisdiction).

ATI also asserts that Telmex has exposed itself to the general personal jurisdiction of Texas because SBC, Telmex's partner in Texas, agreed to be held liable by United States courts for certain actions of Telmex when purchasing the company in accordance with an order of the U.S. District Court for the District of Columbia. Furthermore, Telmex agreed to abide by the order of that court so as to allow SBC and its partnership to purchase a controlling interest in the voting shares of Telmex. Finally, ATI argues, Telmex, when it took SBC as a partner, implicitly agreed to the Modified Final Judgment entered by Judge Green. As support for this argument, ATI cites the Court to Tab 51, Bates #10190 & 10186 and the deposition of Lic. Jose Manuel Camacho Berrueta, attached as Tab 26, p. 46.

According to ATI, the testimony of Berrueta on which it relies for its assertion that SBC is a partner of Telmex reads as follows:

> Q. SBCI is a shareholder in Telmex, correct?
>
> A. I am not sure of the social name or what, but Southwestern Bell is a partner of Telefonos de Mexico. They are owners of part of the shares in Telefonos de Mexico.

However, the Tab 26 attached to ATI's Evidentiary Brief does not contain page 46 from Berrueta's deposition. There-

fore, the Court has no way of assessing the merit, if any, of this particular argument.

ATI next asserts that Telmex has sufficient minimum contacts with Texas to fall under its general personal jurisdiction because it began providing telephone service between Dallas, Texas and Mexico in 1977 pursuant to a contract it signed with AT&T, which was a continuation of an agreement the two companies entered into in 1952. However, after reviewing the two contracts,[27] the Court finds that the terms of this agreement are similar to the earlier discussed correspondent agreements Telmex has with MCI and Sprint. Therefore, for the same reason that those agreements were found not to bring Telmex within the general personal jurisdiction of Texas courts, so too is this agreement with AT&T found inadequate to bring Telmex within its grasp.

ATI next attempts to establish that Telmex is amenable to the general personal jurisdiction of Texas courts on evidence that SEC has a controlling interest in Telmex. However, as ATI points out in its reply, ATI has misrepresented the facts. ATI cites Tab 23, p. 16, in support of its assertion that SBC has a controlling interest in Telmex. Tab 23, p. 16, however, reads, in pertinent part as follows:

> ITEM 4. CONTROL OF REGISTRANT
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> On December 20, 1990, the Government, which previously owned a majority of the Company's capital stock, sold all of the AA Shares, representing 20.4% of the total capital stock of the Company, but a majority of the full voting shares, to a trust for the benefit of a group of investors (the "Controlling Shareholders") led by Grupo Carso, S.A. de C.V. ("Carso") and subsidiaries of Southwestern Bell Corporation (currently known as SBC Communications Inc.) and the French state-owned tele-

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[27] Evid. Br., Tabs 8 and 12

> communications agency France Telecom. It also sold to certain of the controlling shareholders options, which have since been exercised, to acquire 5-41 million L Shares.[28]

Thus, SBC does not by itself own a controlling interest in Telmex. Rather, it is one of several members of a group which holds a majority of the full voting shares in Telmex. Regardless, the fact is that Telmex cannot be said to have taken any action in Texas by virtue of the fact that it offered its stock for sale in Texas. *See Nordic Bank PLC v. Trend Group, Ltd.*, 619 F.Supp. 542 (S.D.N.Y. 1985) (marketing in excess of $100 million of commercial paper by foreign companies through New York brokerage firms did not compel finding that companies were "doing business" in New York within meaning of New York jurisdiction statute, where notes were not sold directly by foreign companies to the public but rather were sold to New York commercial paper dealers who then reoffered them to United States investors; even if foreign companies' marketing of commercial paper through New York brokerage firms constituted "doing business within meaning of New York jurisdiction statute, jurisdiction was nevertheless lacking where they lacked the traditional indicia of doing business in New York, and where cause of action against them did not arise out of those sales). Inasmuch as Telmex lacks the traditional indicia of doing business in Texas and the instant cause of action does not arise from the sale of the stock to SBC, the Court finds that Telmex has not, by selling its stock to SBC, engaged in business in Texas so as to fall under its long-arm jurisdiction.

ATI also cites to Telmex having leased circuits from MCI and AT&T in the United States from the Texas border at El Paso, McAllen and Laredo to Manahawkin, Philadelphia, and Miami as evidence that Telmex has sufficient minimum con-

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[28] Evid. Br., Tab 23, p. 16.

tacts with Texas to justify subjecting it to the general jurisdiction of its courts. ATI cites to Tab 4 and 11 as evidence of these lease agreements. However, Tab 4 is a letter from C. C. Zacha, Manager Director of AT&T, to Hector Carlos Davila, Subdirector of Promotions & Development at Telmex, in which he discusses an agreement to make USADirect Service available from the cities of Cancun, Ixtapa, Puerto Vallarta and Acapulco by June 1, 1989. Tab 11, meanwhile, is a letter dated July 12, 1967 discussing Telmex leasing from AT&T 30 circuits between Nogales, Arizona and El Paso, Texas for service between points in Mexico starting in mid-1968. Nowhere in either document is mention made of Telmex providing telephone service from Texas to Miami, Manahawkin, or Philadelphia.

The next evidence cited by ATI as proof of Telmex having sufficient systematic and continuous contacts with Texas to render it subject to the general jurisdiction of Texas courts is its lease of telephone lines and telephone circuits between Nogales, Arizona and El Paso, Texas since 1975. However, as noted above, the letter designated as Tab 11 concerns the lease by Telmex of 30 circuits "through the United States between Nogales, Arizona and El Paso, Texas for service between points in Mexico. . . ." As this Court understands it, this lease agreement is not materially different than the earlier-discussed correspondent agreements. In the latter, Telmex is paying AT&T for completing calls carried by Telmex to the Mexico-United States border and then switched to the American carriers lines to be carried to its American destination. In the former, it appears that AT&T is merely supplying the 30 circuits between Nogales, Arizona and El Paso, Texas to Telmex to complete calls originating in one point in Mexico and destined to another point in Mexico. Thus, this arrangement with AT&T can no more be viewed as Telmex engaging in systematic and continuous contacts with Texas

anymore than the correspondent contracts could be so viewed.

ATI next argues that Telmex has the requisite minimum contacts with Texas to warrant a Texas court exercising personal jurisdiction over it as a result of it leasing telephone circuits to American companies from the United States, through Mexico, to Guatemala since 1967. However, Tab 2, 12, and 19a, which ATI cites as supporting documentation, do not evidence any such agreement. First, there is no Tab 19a. Moreover, neither Tab 2, p. 3,[29] nor Tab 12,

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[29] Tab 2, p. 3, reads as follows:

> whichever date occurs first. Such equipment shall be used by Telmex solely to provide joint telecommunication services with AT&T.
>
> 3. AT&T shall provide equipment utilizing the North American standard digital hierarchy (*i.e.*, 1.544 Mb/s, 6.312 Mb/s, 44.736 Mb/s and 139.264 Mb/s). AT&T shall provide to Telmex such quantity of multiplex equipment as the parties agree is necessary to accommodate the jointly approved telecommunications traffic requirement for private line and message service between San Diego and Tijuana during the time period that Telmex is entitled, under this Agreement, to use such multiplex equipment. Provided specifically, however, that when the TAT-8 hybrid multiplex equipment becomes available from a vendor acceptable to both parties, AT&T shall not be under any obligation to continue to provide the North American Standard multiplex equipment. Telmex shall accept and utilize the North American standard digital hierarchy during its use of the AT&T-provided equipment under this Agreement.
>
> 4. As part of the multiplexing arrangement, Telmex shall provide, from its inventory, the necessary channel banks associated with the multiplex equipment provided by AT&T. If Telmex's existing Tijuana inventory of seven channel banks is exhausted during the time period that Telmex is entitled to use the subject multiplex equipment, then AT&T shall provide to Telmex all channel banks necessary to accommodate the jointly approved traffic requirements during the remainder of that time period.

Id.

p. 5,[30] mentions the provision of telephone circuits between the United States and Guatemala by Telmex. Accordingly, this argument fails.

ATI further contends that Telmex has made itself susceptible to the general personal jurisdiction of Texas courts because it receives a large portion of its revenues from the provision of I-800 services to Texas residents. However, as this Court explained earlier, the revenue to which ATI refers is generated by Telmex providing to American carriers such as MCI and Sprint its circuits which are contained within the borders of Mexico to complete incoming calls from the United States. Telmex does not perform any of this service

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[30] Tab 12, p. 5, reads as follows:

- The facility planning meetings in which circuit groups and traffic routing will be established.
- Crossborder trunking plans mutually agreed upon by both parties.

I.

Both companies agree to work toward a system of alternate routing which uses a group of trunks between Dallas and Mexico, D.F. as the single final route between their respective networks with a loss probability of 1%. Direct high usage circuit groups connecting the networks may be provided between any two points whenever the mutual traffic generated by these two points and their subordinate areas warrants the provision of 12 or more circuits. The provisions of new circuit groups shall be mutually agreed upon in the context of the facility planning meeting and should be made in groups of 12 (12, 24, 36, etc.) circuits. Circuit groups which would ordinarily be classified as direct high usage groups may also be engineered for low blocking probability and without overflow to any other group.

Where such groups are established they substitute for part of the normal final routes only for the traffic streams for which they are respectively intended. Such groups shall be established only by mutual consent when and where special circumstances exist.

Id.

within the boundaries of Texas. Consequently, that Telmex derives a large portion of its revenues from the provision of such services cannot be relied on for the assertion of personal jurisdiction over it by this Court.

The final basis on which ATI attempts to establish that Telmex is subject to the general personal jurisdiction of Texas courts is the fact that Telmex telecommunications lines cross the Texas border and terminate in Laredo and McAllen. The evidence offered by ATI in support of this assertion is the affidavit of Bradley Tirpak. Therein, Tirpak avers as follows:

> 3. Telmex markets telephone services to certain international providers, including MCI International, Inc. ("MCII"). MCII vends those services through MCI Telecommunications Corporation ("MCIT") in Texas and throughout the United States. Telmex's telecommunication lines cross into Texas and Laredo and McAllen. Calls which cross at these points are then switched at MCIT's switching facility in San Antonio. MCII, in cooperation with Telmex, utilizes these facilities to provide service throughout Texas and the United States. Telmex receives revenue from every call which uses these facilities.

See Affidavit of Bradley Tirpak, attached as Ex. A to ATI's Response to Telmex's Motion to Dismiss for Lack of Jurisdiction Over Its Person (Docket Entry No. 10). Although Telmex has not directly controverted Tirpak's affidavit, a review of the corresponding agreement that Telmex has with MCI shows that Telmex only runs its circuits into Laredo and McAllen so that they may connect with MCI's switching circuits.[31] Therefore, the Court finds that this contact by Telmex

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[31] See Evid. Br., Tab 17, p.4, which shows that the border crossing points are "Nogales/Tucson, Cd. Juarez/El Paso, Reynosa/McAllen, and Tijuana/San Diego."

with Texas is, although continuous, not of sufficient significance to bind Telmex to its jurisdiction.

CONCLUSION

Based on the above findings of fact and conclusions of law, the Court finds that it does not have jurisdiction over the person of the defendant Telefonos de Mexico S .A. de C .V.

Accordingly, it is ORDERED that the Motion of Defendant Telefonos de Mexico, S.A. de C.V. to Dismiss for Lack of Jurisdiction Over its Person be, and the same is hereby, GRANTED and that the defendant Telefonos de Mexico, S.A. de C.V. be dismissed as a party to this action.

SIGNED this the 20th day of June, 1997.

/s/ D.W. Suttle
D. W. SUTTLE
Senior United States District Judge

15 USCS § 1 (2000)

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 USCS § 2 (2000)

§ 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 USCS § 6a (2000)

§ 6a. Conduct involving trade or commerce with foreign nations

This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.